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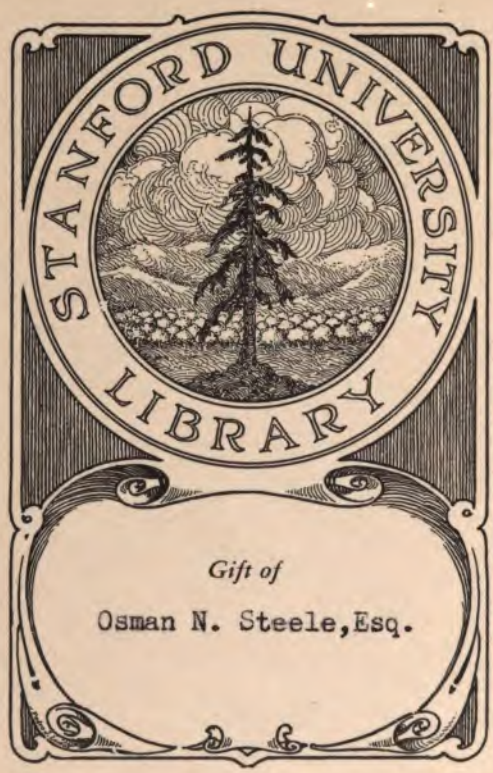
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THE

WORKS

OF

FRANCIS BACON,

BARON OF VERULAM,

VISCOUNT ST. ALBAN,

AND

LORD HIGH CHANCELLOR OF ENGLAND.

IN TEN VOLUMES.

VOL. IV.

LONDON:

PRINTED FOR F. C. AND J. RIVINGTON; J. CUTHELL; T. EGERTON; J. NUNN; CLARKE AND SONS; J. AND A. ARCH; LONGMAN, HURST, REES, ORME, AND BROWN; CADELL AND DAVIES; LACKINGTON AND CO.; J. OTRIDGE; JOHN RICHARDSON; J. M. RICHARDSON; E. JEFFERY; J. HATCHARD; S. BAGSTER; J. MAWMAN; G. GREENLAND; BALDWIN, CRADOCK, AND JOY; J. BOOTH; BLACK AND SON; T. HAMILTON; J. BOHN; RODWELL AND MARTIN; W. STEWART; G. AND W. B. WHITTAKER; C. BROWNE; ISAAC SHELDON; EDWARDS AND KNIGHT; G. MACKIE; AND WILSON AND SON, YORK.

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LAW TRACTS.

THE

ELEMENTS

OF

THE COMMON LAWS

OF

ENGLAND.

CONTAINING,

FIRST,

A Collection of some of the principal RULES and MAXIMS of the COMMON LAW, with their Latitude and Extent.

SECONDLY,

The Use of the COMMON LAW for Preservation of our Persons, Goods, and Good Names; according to the Laws and Customs of this Land.

TO HER

SACRED MAJESTY.

I DO here most humbly present and dedicate unto your Majesty a sheaf and cluster of fruit of the good and favourable season, which by the influence of your happy government we enjoy; for if it be true that *silent leges inter arma*, it is also as true, that your Majesty is in a double respect the life of our laws; once, because without your authority they are but *litera mortua;* and again, because you are the life of our peace, without which laws are put to silence. And as the vital spirits do not only maintain and move the body, but also contend to perfect and renew it; so your sacred Majesty, who is *anima legis*, doth not only give unto your laws force and vigour; but also hath been careful of their amendment and reforming: wherein your Majesty's proceeding may be compared, as in that part of your government, for if your government be considered in all the parts, it is incomparable, with the former doings of the most excellent Princes that ever have reigned, whose study altogether hath been always to adorn and honour times of peace with the amendment of the policy of their laws. Of this proceeding in Augustus Cæsar the testimony yet remains.

Pace data terris, animum ad civilia vertit
Jura suum; legesque tulit justissimus auctor.

Hence was collected the difference between *gesta in armis* and *acta in toga*, whereof Cicero disputeth thus:

Ecquid est, quod tam proprie dici possit actum ejus, qui togatus in republica cum potestate imperioque

versatus sit, quam lex? quære acta Gracchi: leges Sempronia proferantur. Quære Syllæ: Corneliæ. Quid? Cn. Pompeii tertius consulatus in quibus ac-
Phil. i. c. 7. *tis consistit? nempe in legibus. A Cæsare ipso si quæreres quidnam egisset in urbe, et in toga: leges multas se responderet, et præclaras tulisse.*

The same desire long after did spring in the emperor Justinian, being rightly called *ultimus imperatorum Romanorum*, who having peace in the heart of his empire, and making his wars prosperously in the remote places of his dominions by his lieutenants, chose it for a monument and honour of his government, to revise the Roman laws, and to reduce them from infinite volumes and much repugnancy and uncertainty into one competent and uniform corps of law; of which matter himself doth speak gloriously, and yet aptly, calling it, *proprium et sanctissimum templum justitiæ consecratum:* a work of great excellency indeed, as may well appear, in that France, Italy, and Spain, which have long since shaken off the yoke of the Roman empire, do yet nevertheless continue to use the policy of that law: but more excellent had the work been, save that the more ignorant and obscure time undertook to correct the more learned and flourishing time. To conclude with the domestic example of one of your Majesty's royal ancestors: King Edward I. your Majesty's famous progenitor, and principal law-giver of our nation, after he had in younger years given himself satisfaction in glory of arms, by the enterprise of the Holy Land, having inward peace, otherwise than for the invasion which himself made upon Wales and Scotland, parts far distant from the centre of the realm, he bent himself to endow his state with sundry notable and fundamental laws, upon which the government ever since hath principally rested. Of this example, and other the like, two reasons may be given; the one, because that kings, which, either by the moderation of their natures, or the maturity of their years and judgment, do temper their magnanimity with justice, do wisely consider and conceive of the exploits of am-

bitious wars, as actions rather great than good; and so, distasted with that course of winning honour, they convert their minds rather to do somewhat for the better uniting of human society, than for the dissolving or disturbing of the same. Another reason is, because times of peace, drawing for the most part with them abundance of wealth, and finesse of cunning, do draw also, in further consequence, multitudes of suits and controversies, and abuses of laws by evasions and devices; which inconveniences in such times growing more general, do more instantly solicit for the amendment of laws to restrain and repress them.

Your Majesty's reign having been blest from the Highest with inward peace, and falling into an age, wherein, if science be increased, conscience is rather decayed; and if mens wits be great, their wills are more great; and wherein also laws are multiplied in number, and slackened in vigour and execution; it was not possible but that not only suits in law should multiply and increase, whereof always a great part are unjust, but also that all the indirect and sinister courses and practises to abuse law and justice should have been much attempted, and put in use, which no doubt had bred great enormities, had they not, by the royal policy of your Majesty, by the censure and foresight of your Council-table and Star-chamber, and by the gravity and integrity of your benches been repressed and restrained: for it may be truly observed, that, as concerning frauds in contracts, bargains, and assurances, and abuses of laws by delays, covins, vexations, and corruptions in informers, jurors, ministers of justice, and the like, there have been sundry excellent statutes made in your Majesty's time, more in number, and more politic in provision, than in any of your predecessors times.

But I am an unworthy witness to your Majesty of an higher intention and project, both by that which was published by your chancellor in full parliament from your royal mouth, in the five and thirtieth of your happy reign: and much more by that which I have been vouchsafed to understand from your Ma-

jesty, importing a purpose for these many years infused in your Majesty's breast, to enter into a general amendment of the state of your laws, and to reduce them to more brevity and certainty, that the great hollowness and unsafety in assurances of lands and goods may be strengthened, the snaring penalties, that lie upon many subjects, removed, the execution of many profitable laws revived, the judge better directed in his sentence, the counsellor better warranted in his counsel, the student eased in his reading, the contentious suitor, that seeketh but vexation, disarmed, and the honest suitor, that seeketh but to obtain his right, relieved; which purpose and intention, as it did strike me with great admiration when I heard it, so it might be acknowledged to be one of the most chosen works, of highest merit and beneficence towards the subject, that ever entered into the mind of any King; greater than we can imagine, because the imperfections and dangers of the laws are covered under the clemency and excellent temper of your Majesty's government. And though there be rare precedents of it in government, as it cometh to pass in things so excellent, there being no precedent full in view but of Justinian; yet I must say as Cicero said to Cæsar, *Nihil vulgare te dignum videri potest;* and as it is no doubt a precious seed sown in your Majesty's heart by the hand of God's divine Majesty, so, I hope, in the maturity of your Majesty's own times it will come up and bear fruit. But to return from thence whither I have been carried; observing in your Majesty, upon so notable proofs and grounds, this disposition in general of a prudent and royal regard to the amendment of your laws, and having by my private travel collected many of the grounds of the common laws, the better to establish and settle a certain sense of law, which doth now too much waver in uncertainty, I conceived the nature of the subject, besides my particular obligation, was such, as I ought not to dedicate the same to any other than to your sacred Majesty; both because though the collection be mine, yet the laws are yours; and because it

is your Majesty's reign that hath been as a goodly seasonable spring weather to the advancing of all excellent arts of peace. And so concluding with a prayer answerable to the present argument, which is, that God will continue your Majesty's reign in a happy and renowned peace, and that he will guide both your policy and arms to purchase the continuance of it with surety and honour, I most humbly crave pardon, and commend your majesty to the divine preservation.

Your sacred MAJESTY'S *most humble and obedient subject and servant,*

FRANCIS BACON.

1596.

THE

PREFACE.

I HOLD every man a debtor to his profession; from the which as men of course do seek to receive countenance and profit, so ought they of duty to endeavour themselves, by way of amends, to be a help and ornament thereunto. This is performed in some degree by the honest and liberal practice of a profession, when men shall carry a respect not to descend into any course that is corrupt and unworthy thereof, and preserve themselves free from the abuses wherewith the same profession is noted to be infected: but much more is this performed if a man be able to visit and strengthen the roots and foundation of the science itself; thereby not only gracing it in reputation and dignity, but also amplifying it in profession and substance. Having therefore from the beginning come to the study of the laws of this realm, with a mind and desire no less, if I could attain unto it, that the same laws should be the better by my industry, than that myself should be the better by the knowledge of them; I do not find that by mine own travel, without the help of authority, I can in any kind confer so profitable an addition unto that science, as by collecting the rules and grounds dispersed throughout the body of the same laws; for hereby no small light will be given in new cases, and such wherein there is no direct authority to sound into the true conceit of law, by the depth of reason, in cases wherein the authorities do square and vary, to confirm the law, and to make it received one way; and in cases wherein the law is cleared by authority, yet nevertheless to see more profoundly into the reason of such judgments and ruled cases, and thereby to make more use of them for the decision of other cases more doubtful: so that the uncertainty of law, which is the most principal and just challenge that is made to the laws of our nation at this

time, will, by this new strength laid to the foundation, somewhat the more settle and be corrected. Neither will the use hereof be only in deciding of doubts, and helping soundness of judgment, but further in gracing of argument, in correcting of unprofitable subtlety, and reducing the same to a more sound and substantial sense of law; in reclaiming vulgar errors, and generally in the amendment in some measure of the very nature and complexion of the whole law: and therefore the conclusions of reason of this kind are worthily and aptly called by a great civilian *legum leges*, for that many *placita legum*, that is, particular and positive learnings of laws, do easily decline from a good temper of justice, if they be not rectified and governed by such rules.

Now for the manner of setting down of them, I have in all points, to the best of my understanding and foresight, applied myself not to that which might seem most for the ostentation of mine own wit or knowledge, but to that which may yield most use and profit to the students and professors of the laws.

And therefore, whereas these rules are some of them ordinary and vulgar, that now seem but for grounds and plain songs to the more shallow and impertinent sort of arguments; either of them are gathered and extracted out of the harmony and congruity of cases, and are such as the wisest and deepest sort of lawyers have in judgment and in use, though they be not able many times to express and set them down.

For the former sort, which a man that should rather write to raise an high opinion of himself, than to instruct others, would have omitted, as trite and within every man's compass; yet nevertheless I have not affected to neglect them, but having chosen out of them such as I thought good, I have reduced them to a true application, limiting and defining their bounds, that they may be run upon at large, but restrained to point of difference: for as, both in the law and other sciences, the handling of questions by common-place, without aim or application, is the weakest; so yet nevertheless many common principles and generalities

are not to be contemned, if they be well derived and reduced into particulars, and their limits and conclusions duly assigned; for there be two contrary faults and extremities in the debating and sifting out the law, which may be best noted in two several manner of arguments: Some argue upon general grounds, and come not near to the point in question: others, without laying any foundation of a ground or difference or reason, do loosely put cases, which, though they go near the point, yet being so scattered, prove not, but rather serve to make the law appear more doubtful than to make it more plain.

Secondly, whereas some of these rules have a concurrence with the civil Roman law, and some others a diversity, and many times an opposition, such grounds which are common to our law and theirs I have not affected to disguise into other words than the civilians use, to the end they might seem invented by me, and not borrowed or translated from them: no, but I took hold of it as a matter of great authority and majesty, to use and consider the concordance between the laws penned, and as it were dictated *verbatim*, by the same reason. On the other side, the diversities between the civil Roman rules of law and ours, happening either when there is either such an indifferency of reason so equally balanced, as the one law embraceth one course, and the other the contrary, and both just, after either is once positive and certain; or where the laws vary in regard of accommodating the law to the different considerations of estate, I have not omitted to set down with the reasons.

Thirdly, whereas I could have digested these rules into a certain method or order, which, I know, would have been more admired, as that which would have made every particular rule, through his coherence and relation unto other rules, seem more cunning and more deep; yet I have avoided so to do, because this delivering of knowledge in distinct and disjoined aphorisms doth leave the wit of man more free to turn and to toss, and to make use of that which is so delivered to more several purposes and applications; for we see that all

posterous to prove rules and maxims; wherein I had the example of Mr. Littleton and Mr. Fitzherbert, whose writings are the institutions of the laws of England: whereof the one forbeareth to vouch any authority altogether; the other never reciteth a book, but when he thinketh the case so weak in credit of itself as it needeth surety; and these two I did far more esteem than Mr. Perkins or Mr. Standford, that have done the contrary. Well will it appear to those that are learned in the laws, that many of the cases are judged cases, either within the books, or of fresh report, and most of them fortified by judged cases and similitude of reason; though in some cases I did intend expressly to weigh down authorities by evidence of reason, and therein rather to correct the law, than either to sooth a received error, or by unprofitable subtlety, which corrupteth the sense of the law, to reconcile contrarieties. For these reasons I resolved not to derogate from the authority of the rules, by vouching of the authorities of the cases, though in mine own copy I had them quoted: for although the meanness of mine own person may now at first extenuate the authority of this collection, and that every man is adventurous to control; yet surely, according to Gamaliel's reason, if it be of weight, time will settle and authorise it; if it be light and weak, time will reprove it. So that, to conclude, you have here a work without any glory of affected novelty, or of method, or of language, or of quotations and authorities, dedicated only to use, and submitted only to the censure of the learned, and chiefly of time.

Lastly, there is one point above all the rest I account the most material for making these reasons indeed profitable and instructing; which is, that they be not set down alone, like short dark oracles, which every man will be content to allow still to be true, but in the mean time they give little light and direction; but I have attended them, a matter not practised, no not in the civil law to any purpose, and for want whereof, the rules indeed are but as proverbs, and many times plain fallacies, with a clear and perspicuous exposition, breaking them into cases, and opening their sense and

use, and limiting them with distinctions, and sometimes shewing the reasons whereupon they depend, and the affinity they have with other rules. And though I have thus, with as much discretion and foresight as I could, ordered this work, and as I may say, without all colours or shews, husbanded it best to profit; yet nevertheless not wholly trusting to mine own judgment: having collected three hundred of them, I thought good, before I brought them all into form, to publish some few, that by the taste of other mens opinions in this first, I might receive either approbation in mine own course, or better advice for the altering of the other which remain: for it is great reason that that which is intended to the profit of others, should be guided by the conceits of others.

THE

MAXIMS OF THE LAW.

REGULA I.

In jure non remota causa sed proxima spectatur.

It were infinite for the law to consider the causes of causes, and their impulsions one of another; therefore it contenteth itself with the immediate cause, and judgeth of acts by that, without looking to any further degree.

6 H. 8. Dy. fo. 1. et 2. As if an annuity be granted *pro consilio impenso et impendendo*, and the grantee commit treason, whereby he is imprisoned, so that the grantor cannot have access unto him for his counsel; yet nevertheless the annuity is not determined by this *non-feasance;* yet it was the grantee's act and default to commit the treason, whereby the imprisonment grew: but the law looketh not so far, and excuseth him, because the not giving counsel was compulsory, and not voluntary, in regard of the imprisonment.

Litt. cap. Discont. 2 H. 4 5. 26 H. 8. 2. So if a parson make a lease, and be deprived, or resign, the successors shall avoid the lease; and yet the cause of deprivation, and more strongly of a resignation, moved from the party himself: but the law regardeth not that, because the admission of the new incumbent is the act of the ordinary.

5 H. 7. 35. So if I be seised of an advowson in gross, and an usurpation be had against me, and at the next avoidance I usurp arere, I shall be remitted: and yet the presentation, which is the act remote, is mine own act; but the admission of my clerk, whereby the

inheritance is reduced to me, is the act of the ordinary.

So if I covenant with I. S. a stranger, in consideration of natural love to my son, to stand seised to the use of the said I. S. to the intent he shall infeoff my son; by this no use will rise to I. S. because the law doth respect that there is no immediate consideration between me and I. S.

So if I be bound to enter into a statute before the mayor of the staple at such a day, for the security of a hundred pounds, and the obligee, before the day, accept of me a lease of an house in satisfaction; this is no plea in debt upon my obligation: and yet the end of this statute was but security for money; but because the entering into this statute itself, which is the mediate act whereto I am bound, is a corporal act which lieth not in satisfaction, therefore the law taketh no consideration that the remote intent was for money. 12 H. 4. 4 H. 8. Dy. f. 1.

So if I make a *feoffment in fee, upon condition that the feoffee shall infeoff over, and the feoffee be disseised, and a descent cast, and then the feoffee bind himself in a statute, which statute is discharged before the recovery of the land: this is no breach of the condition, because the land was never liable to the statute, and the possibility that it should be liable upon recovery the law doth not respect. 37 R. Chest.

So if I enfeoff two, upon condition to enfeoff, and one of them take a wife, the condition is not broken; and yet there is a remote possibility that the joint-tenant may die, and then the feme is intitled to dower.

So if a man purchase land in fee-simple, and die without issue; in the first degree the law respecteth dignity of sex, and not proximity; and therefore the remote heir on the part of the father shall have it, before the near heir on the part of the mother: but, in any degree paramount the first the law respecteth it not, and therefore the near heir by the grandmother on the part of the father shall have it, be-

* M. 40 et 41. El. Julius Winnington's case, ore report per le tresreverend Judge, le Sur Coke, lib. 2.

fore the remote heir of the grandfather on the part of the father.

This rule faileth in covinous acts, which though they be conveyed through many degrees and reaches, yet the law taketh heed to the corrupt beginning, and counteth all as one intire act.

37 R. Dacres case, obiter.

As if a feoffment be made of lands held in knight's service to I. S. upon condition that he within a certain time shall infeoff I. D. which feoffment to I. D. shall be to the wife of the first feoffer for her jointure, etc. this feoffment is within the statute of 32 H. VIII. *nam dolus circuitu non purgatur.*

In like manner this rule holdeth not in criminal acts, except they have a full interruption; because when the intention is matter of substance, and that which the law doth principally behold, there the first motive must be principally regarded, and not the last impulsion. As if I. S. of malice prepense discharge a pistol at I. D. and miss him, whereupon he throws down his pistol and flies, and I. D. pursueth him to kill him, whereupon he turneth and killeth I. D. with a dagger; if the law should consider the last impulsive cause, it should say that this was in his own defence; but the law is otherwise, for it is but a pursuance and execution of the first murderous intent.

Op. Catteslyn et autres in case de Stoel.

44 Ed. 3.

But if I. S. had fallen down, his dagger drawn, and I. D. had fallen by haste upon his dagger, there I. D. had been *felo de se*, and I. S. shall go quit.

Also you may not confound the act with the execution of the act; nor the intire act with the last part, or the consummation of the act.

Lit. cap. de discent.

For if a disseisor enter into religion, the immediate cause is from the party, though the descent be cast in law; but the law doth but execute the act which the party procureth, and therefore the descent shall not bind, *et e converso.*

21 Eliz.

If a lease for years be made rendering rent, and the lessee make a feoffment of part, and the lessor enter, the immediate cause is from the law in respect of the forfeiture, though the entry be the act of the party; but that is but the pursuance and putting in

24 H. 8. fo. 4. Dy. 21 R.

execution of the title which the law giveth: and therefore the rent or condition shall be apportioned.

So in the binding of a right by a descent, you are to consider the whole time from the disseisin to the descent cast; and if at all times the person be not privileged, the descent binds.

And therefore if a feme covert be disseised, and the baron dieth, and she taketh a new husband, and then the descent is cast: or if a man that is not *infra quatuor maria*, be disseised, and return into England, and go over sea again, and then a descent is cast, this descent bindeth, because of the *interim* when the persons might have entered; and the law respecteth not the state of the person at the last time of the descent cast, but a continuance from the very disseisin to the descent. 9 H. 7. 24. 3 et 4 P. et M. Dr. 143.

So if baron and feme be, and they join in feoffment of the wife's land rendring rent, and the baron die, and the feme take a new husband before any rent-day, and he accept the rent, the feoffment is affirmed for ever. 4 et 5 P. et M. Dy. 159.

REGULA II.

Non potest adduci exceptio ejusdem rei, cujus petitur dissolutio.

It were impertinent and contrary in itself, for the law to allow of a plea in bar of such matter as is to be defeated by the same suit; for it is included: and otherwise a man should never come to the end and effect of his suit, but be cut off in the way.

And therefore if tenant in tail of a manor, whereunto a villain is regardant, discontinue and die, and the right of entail descend unto the villain himself, who brings *formedon*, and the discontinuee pleadeth villenage; this is no plea, because the devester of the manor, which is the intent of the suit, doth include this plea, because it determineth the villenage.

So if tenant in ancient demesne be disseised by the lord, whereby the seigniory is suspended, and the dis- 50 E. 3.

seisee bring his assize in the court of the lord, frank fee is no plea, because the suit is to undo the disseisin, and to receive the seigniory in ancient demesne.

7 H. 4. 39. 7 H. 6. 44. So if a man be attainted and executed, and the heir bring error upon the attainder, and corruption of blood by the same attainder be pleaded, to interrupt his conveying in the said writ of error; this is no plea, for then he were without remedy ever to reverse the attainder.

38 Ed. 3. 32. So if tenant in tail discontinue for life rendering rent, and the issue brings *formedon*, and the warrant of his ancestor with assets is pleaded against him, and the assets is layed to be no other but his reversion with the rent; this is no plea, because the *formedon* which is brought to undo this discontinuance, doth inclusively undo this new reversion in fee, and the rent thereunto annexed.

But whether this rule may take place when the matter of the plea is not to be avoided in the same suit but in another suit, is doubtful; and I rather take the law to be, that this rule doth extend to such cases; where otherwise the party were at a mischief, in respect the exceptions or bars might be pleaded cross, either of them, in the contrary suit; and so the party altogether prevented and intercepted to come by his right.

So if a man be attainted by two several attainders, and there is error in them both, there is no reason but there should be a remedy open for the heir to reverse those attainders being erroneous, as well if they be twenty as one.

And therefore, if in the writ of error brought by the heir of one of them, the other attainder should be a plea peremptorily; and so again, if in error brought of that other, the former should be a plea; these were to exclude him utterly of his right: and therefore it shall be a good replication to say, that he hath a writ of error depending of that also, and so the court shall proceed: but no judgment shall be given till both pleas be discussed; and if either plea be found without error, there shall be no reversal either of the one or of the other; and if he discontinue either writ, then

shall it be no longer a plea: and so of several outlawries in a personal action.

And this seemeth to me more reasonable, than that generally an outlawry or an attainder should be no plea in a writ of error brought upon a diverse out lawry or attainder, as 7 H. IV. and 7 H. VI. seem to hold; for that is a remedy too large for the mischief; for there is no reason but if any of the outlawries be indeed without error, but it should be a peremptory plea to the person in a writ of error, as well as in any other action.

But if a man levy a fine *sur conusaunce de droit come ceo que il ad de son done*, and suffer a recovery of the same lands, and there be error in them both, he cannot bring error first of the fine, because by the recovery his title of error is discharged and released in law *inclusivè*, but he must begin with the error upon 37 R. the recovery, which he may do, because a fine executed barreth no titles that accrue *de puisne tems* after the fine levied, and so restore himself to his title of error upon the fine: but so it is not in the former case of the attainder; for the writ of error to a former attainder is not given away by a second, except it be by express words of an act of parliament, but only it remaineth a plea to his person while he liveth, and to the conveyance of the heir after his death.

But if a man levy a fine where he hath nothing in the land, which inureth by way of conclusion only, and is executory against all purchases and new titles which shall grow to the conusor afterwards, and he purchase the land, and suffer a recovery to the conusee, and in both fine and recovery there is error; this fine is *Janus bifrons*, and will look forwards, to bar him in the writ of error brought of the recovery; and therefore it will come to the reason of the first cause of the attainder, that he must reply, that he hath a writ of error also depending of the same fine, and so demand judgment.

To return to our first purpose, like law is it if tenant 16 E. 3. in tail of two acres make two several discontinuances Fitz. age, 45. to two several persons for life rendering, and bring the *formedon* of both, and in *formedon* brought of white

acre the reversion and rent reserved upon black acre is pleaded, and so contrary. I take it to be a good replication, that he hath *formedon* also upon that depending, whereunto the tenant hath pleaded the descent of the reversion of white acre; and so neither shall be a bar: and yet there is no doubt but if in a *formedon* the warrant of tenant in tail with assets be pleaded, it is a replication for the issue to say, that a *præcipe* dependeth brought by I. S. to evict the assets.

But the former case standeth upon the particular reason before mentioned.

REGULA III.

Verba fortius accipiuntur contra proferentem.

THIS rule, that a man's deeds and his words shall be taken strongliest against himself, though it be one of the most common grounds of the law, it is notwithstanding a rule drawn out of the depth of reason; for, first, it is a schoolmaster of wisdom and diligence in making men watchful in their own business; next it is author of much quiet and certainty, and that in two sorts; first, because it favoureth acts and conveyances executed, taking them still beneficially for the grantees and possessors: and secondly, because it makes an end of many questions and doubts about construction of words; for if the labour were only to pick out the intention of the parties, every judge would have a several sense; whereas this rule doth give them a sway to take the law more certainly one way.

But this rule, as all other rules which are very general, is but a sound in the air, and cometh in sometimes to help and make up other reasons without any great instruction or direction; except it be duly conceived in point of difference, where it taketh place, and where not. And first we will examine it in grants, and then in pleadings.

The force of this rule is in three things, in ambiguity of words, in implication of matter, and reducing and qualifying the exposition of such grants as were

against the law, if they were taken according to their words.

And therefore if I. S. submit himself to arbitrement of all actions and suits between him and I. D. and I. N. it rests ambiguous whether this submission shall be intended *collectivè* of joint actions only, or *distributivè* of several actions also; but because the words shall be strongliest taken against I. S. that speaks them, it shall be understood of both: for if I. S. had submitted himself of all actions and suits which he hath now depending, except it be such as are between him and I. D. and I. N. now it shall be understood *collectivè* only of joint actions, because in the other case large construction was hardest against him that speaks, and in this case strict construction is hardest. 2 R. 3. 18. 21 H. 7. 29.

So if I grant ten pounds rent to baron and feme, and if the baron die that the feme shall have three pounds rent, because these words rest ambiguous whether I intend three pounds by way of increase, or three pounds by way of restraint and abatement of the former rent of ten pounds, it shall be taken strongliest against me that am the grantor, that is three pounds addition to the ten pounds: but if I had let lands to baron and feme for three lives, reserving ten pounds *per annum*, and, if the baron die, reddendum three pounds; this shall be taken contrary to the former case, to abridge my rent only to three pounds. 8 Ass. p. 10.

So if I demise *omnes boscos meos in villa de Dale* for years, this passeth the soil; but if I demise all my lands in Dale *exceptis boscis*, this extendeth to the trees only, and not to the soil. 14 H. 8. 28 H. 8. Dr. 19.

So if I sow my land with corn, and let it for years, the corn passeth to the lessee, if I except it not; but if I make a lease for life to I. S. upon condition that upon request he shall make me a lease for years, and I. S. sow the ground, and then I make request, I. S. may well make me a lease excepting his corn, and not break the condition.

So if I have free warren in my own land, and let my land for life, not mentioning my warren, yet the lessee by implication shall have the warren discharged and extinct during his lease: but if I had let the land *una* 8 H. 9. 5. 32 H. 6. 24. 28 H. 8. Dy. 30. 6.

cum libera garrena, excepting white acre, there the warren is not by implication reserved unto me either to be enjoyed or to be extinguished; but the lessee shall have the warren against me in white acre.

29 Ass. pl. 20. So if I. S. hold of me by fealty and rent only, and I grant the rent, not speaking of the fealty; yet the fealty by implication shall pass, because my grant shall be taken strongly as of a rent service, and not of a rent secke.

44 Ed. 3. 19. Otherwise had it been if the seigniory had been by homage, fealty, and rent, because of the dignity of the service, which could not have passed by intendment by the grant of the rent: but if I be seised of the manor of Dale in fee, whereof I. S. holds by fealty and rent, and I grant the manor, excepting the rent of I. S. there the fealty shall pass to the grantee, and I shall have but a rent secke.

26 Ass. pl. 66.

So in grants against the law, if I give land to I. S. and his heirs males, this is a good fee-simple, which is a larger estate than the words seem to intend, and the word "males" is void. But if I make a gift in tail, reserving rent to me and the heirs of my body, the words "of my body" are not void, and so leave it rent in fee-simple; but the words "heirs and all" are void, and leaves that but a rent for life; except that you will say, it is but a limitation to any my heir in fee-simple which shall be heir of my body; for it cannot be a rent in tail by reservation.

45 Ed. 3. 290. 24 R. But if I give lands with my daughter in frank marriage, the remainder to I. S. and his heirs, this grant cannot be good in all parts, according to the words: for it is incident to the nature of a gift in frank marriage, that the donee hold of the donor; and therefore my deed shall be taken so strongly against myself, that rather than the remainder shall be void, the frank marriage, though it be first placed in the deed, shall be void as a frank marriage.

4 H. 6. 22. 26 Ass. pl. 66. But if I give land in frank marriage, reserving to me and my heirs ten pounds rent, now the frank marriage stands good, and the reservation is void, because it is a limitation of a benefit to myself, and not to a stranger.

So if I let white acre, black acre, and green acre to I. S. excepting white acre, this exception is void, because it is repugnant; but if I let the three acres aforesaid, reddendo twenty shillings rent, *viz.* for white acre ten shillings, and for black acre ten shillings, I shall not distrain at all in green acre, but that shall be discharged of my rent.

So if I grant a rent to I. S. and his heirs out of my manor of Dale, *et obligo manerium prædictum et omnia bona et catalla mea super manerium prædictum existentia ad distringendum per ballivos domini regis:* this limitation of the distress to the king's bailiffs is void, and it is good to give a power of distress to I. S. the grantee, and his bailiffs. 46 E. 3. 18.

But if I give land in tail *tenendo de capitalibus dominis per redditum viginti solidorum per fidelitatem:* this limitation of tenure to the chief lord is void; but it shall not be good, as in the other case, to make a reservation of twenty shillings good unto myself; but it shall be utterly void, as if no reservation at all had been made: and if the truth be that I, that am the donor, hold of the lord paramount by ten shillings only, then there shall be ten shillings only intended to be reserved upon the gift in tail as for ovelty. 2 Ed. 4. 5.

So if I give land to I. S. and the heirs of his body, and for default of such issue *quod tenementum prædictum revertatur ad I. N.* yet these words of reversion will carry a remainder to a stranger. But if I let white acre to I. S. excepting ten shillings rent, these words of exception to mine own benefit shall never inure to words of reservation. 21 Ed. 3. 49. 31 et 32 H. 8. Dyer 46. Plow. fo. 37. 35 H. 6. 34.

But now it is to be noted, that this rule is the rule which is last to be resorted to, and is never to be relied upon but where all other rules of exposition of words fail; and if any other rule come in place, this giveth place. And that is a point worthy to be observed generally in the rules of the law, that when they encounter and cross one another in any case, that be understood which the law holdeth worthier, and to be preferred; and it is in this particular very notable to consider, that this being a rule of some strictness

and rigor, doth not, as it were, his office, but in absence of other rules which are of some equity and humanity; which rules you shall find afterwards set down with their expositions and limitations.

But now to give a taste of them to this present purpose: it is a rule, that general words shall never be stretched to foreign intendment, which the civilians utter thus: *Verba generalia restringuntur ad habilitatem personæ, vel ad aptitudinem rei.*

14 Ass. pl. 21. Therefore if a man grant to another, common *intra metas et bundas villæ de Dale*, and part of the ville is his several, and part is his waste and common; the grantee shall not have common in the several: and yet that is the strongest exposition against the grantor.

Lit. cap. cond. So it is a rule, *Verba ita sunt intelligenda, ut res magis valeat, quam pereat*: and therefore if I give land to I. S. and his heirs, *reddendo quinque libras annuatim* to I. D. and his heirs, this implies a condition to me that am the grantor; yet it were a stronger exposition against me, to say the limitation should be void, and the feoffment absolute.

10 Ed. 4. 1. So it is a rule, that the law will not intend a wrong, which the civilians utter thus: *Ea est accipienda interpretatio, quæ vitio caret.* And therefore if the executors of I. S. grant *omnia bona et catalla sua*, the goods which they have as executors, will not pass, because *non constat* whether it may not be a devastation, and so a wrong; and yet against the trespasser that taketh them out of their possession, they shall declare *quod bona sua cepit.*

So it is a rule, words are to be understood that they work somewhat, and be not idle and frivolous: *Verba aliquid operari debent, verba cum effectu sunt accipienda.* And therefore if I bargain and sell you four parts of my manor of Dale, and say not in how many parts to be divided, this shall be construed four parts of five, and not of six nor seven, etc. because that it is the strongest against me; but on the other side, it shall not be intended four parts of four parts, that is whole of four quarters; and yet that were strongest of all, but then the words were idle and of none effect.

So it is a rule, *Divinatio non interpretatio est, quæ omnino recedit a litera:* and therefore if I have a free rent or fee farm-rent issuing out of white acre of ten shillings, and I reciting the same reservation do grant to I. S. the rent of five shillings *percipiend' de reddit' prædict' et de omnibus terris et tenementis meis in Dale,* with a clause of distress, although there be atturnement, yet nothing passeth out of my former rent; and yet that were strongest against me to have it a double rent, or grant of part of that rent with an enlargement of a distress in the other land, but for that it is against the words, because *copulatio verborum inclinat exceptionem in eodem sensu,* and the word *de, anglicè* out of, may be taken in two senses, that is, either as a greater sum out of a less, or as a charge out of land, or other principal interest; and that the coupling of it with lands and tenements, doth define the sense to be one rent issuing out of another, and not as a lesser rent to be taken by way of computation out of a greater: therefore nothing passeth of that rent. But if it stood of itself without these words of land and tenements, namely, I reciting that I am seised of such a rent of ten shillings, do grant five shillings *percipiend' de eodem reddit',* it is good enough without atturnement; because *percipiend' de etc.* may well be taken for *parcella de etc.* without violence to the words; but if it had been *percipiend' de,* I. S. without saying *de redditibus prædict',* although I. S. be the person that payeth me the foresaid rent of ten shillings, yet it is void: and so it is of all other rules of exposition of grants, when they meet in opposition with this rule, they are preferred. 3 H. 6. 20.

Now to examine this rule in pleadings as we have done in grants, you shall find that in all imperfections of pleadings, whether it be in ambiguity of words and double intendments, or want of certainty and averments, or impropriety of words, or repugnancy and absurdity of words, even the plea shall be strictly and strongly taken against him that pleads.

For ambiguity of words, if in a writ of entry upon disseisin, the tenant pleads jointenancy with I. S. of the gift and feoffment of I. D. judgment *de briefe,* 22H. 6. 43.

the demandant saith that long time before I. D. any thing had, the demandant himself was seised in fee *quousque prædict' I. D. super possessionem ejus intravit*, and made a joint feoffment, whereupon he the demandant re-entred, and so was seised until by the defendant alone he was disseised; this is no plea, because the word *intravit* may be understood either of a lawful entry, or of a tortious; and the hardest against him shall be taken, which is, that it was a lawful entry; therefore he should have alledged precisely that I. D. *disseisivit*.

3 Ed. 6. Dy. 66. So upon ambiguity that grows by reference, if an action of debt be brought against I. N. and I. P. sheriffs of London, upon an escape, and the plaintiff doth declare upon an execution by force of a recovery in the prison of Ludgate *sub custodia* I. S. *et* I. D. then sheriffs in 1 K. H. VIII. and that he so continued *sub custodia I. B. et I. G.* in 2 K. H. VIII. and so continued *sub custodia I. N. et I. L.* in 3 K. H. VIII. and then was suffered to escape: I. N. and I. L. plead, that before the escape, supposed at such a day *anno superius in narratione specificato*, the said I. D. and I. S. *ad tunc vicecomites* suffered him to escape; this is no good plea, because there be three years specified in the declaration, and it shall be hardliest taken that it was 1 or 3 H. VIII. when they were out of office; and yet it is nearly induced by the *ad tunc vicecomites*, which should leave the intendment to be of that year in which the declaration supposeth that they were sheriffs; but that sufficeth not, but the year must be alleged in fact, for it may be it was mislaid by the plaintiff, and therefore the defendants meaning to discharge themselves by a former escape, which was not in their time, must allege it precisely.

26 H. 8. For incertainty of intendment, if a warranty collateral be pleaded in bar, and the plaintiff by replication, to avoid warranty, saith, that he entered upon the possession of the defendant, *non constat* whether this entry was in the life of the ancestor, or after the warranty attached; and therefore it shall be taken in hardest sense, that it was after the warranty descended, if it be not otherwise averred.

For impropriety of words, if a man plead that his ancestors died by protestation seised, and that I. S. abated, *etc.* this is no plea, for there can be no abatement except there be a dying seised alleged in fact; and an abatement shall not improperly be taken for disseisin in pleading, *car parols sont pleas.* 38 H. 6. 18. 39 H. 6. 5.

For repugnancy, if a man in avowry declares that he was seised in his demesne as of fee of white acre, and being so seised did demise the same white acre to I. S. *habendum* the moiety for twenty-one years from the date of the deed, the other moiety from the surrender, expiration, or determination of the estate of I. D. *qui tenet prædict' medietatem ad terminum vitæ suæ reddend'* 40s. rent: this declaration is insufficient, because the seisin that he hath alleged in himself in his demesne as of fee in the whole, and the state for life of a moiety, are repugnant; and it shall not be cured by taking the last which is expressed to control the former, which is but general and formal; but the plea is naught, yet the matter in law had been good to have intitled him to have distrained for the whole rent. 9 R. Dy. fo. 256.

But the same restraint follows this rule in pleading that was before noted in grants: for if the case be such as falleth within any other rule of pleadings, then this rule may not be urged.

And therefore it is a rule that a bar is good to a common intent. As if a debt be brought against five executors, and three of them make default, and two appear and plead in bar a recovery had against them two of 300*l.* and nothing in their hands over and above that sum: if this bar should be taken strongliest against them, then it should be intended that they might have abated the first suit, because the other three were not named, and so the recovery not duly had against them; but because of this other rule the bar is good: for that the more common intent will say, that they two did only administer, and so the action well conceived; rather than to imagine, that they would have lost the benefit and advantage of abating of the writ. 9 Ed. 4. 4 Ed. 6. Plow.

So there is another rule, that in pleading a man shall not disclose that which is against himself: and there-

fore if it be a matter that is to be set forth on the other side, then the plea shall not be taken in the hardest sense, but in the most beneficial, and to be left unto the contrary party to allege.

28 H. 8. Dy. fo. 17. And therefore if a man be bound in an obligation, that if the feme of the obligee do decease before the feast of St. John the Baptist which shall be in the year of our Lord God 1598, without issue of her body by her husband lawfully begotten then living, that then the bond shall be void; and in debt brought upon this obligation the defendant pleads the feme died before the said feast without issue of her body then living: if this plea should be taken strongliest against the defendant, then should it be taken that the feme had issue at the time of her death, but issue died before the feast; but that shall not be so understood, because it makes against the defendant, and it is to be brought in on the plaintiff's side, and that without traverse.

30 E. 3. So if in a detinue brought by a feme against the executors of her husband for the reasonable part of the goods of her husband, and her demand is of a moiety, and she declares upon the custom of the realm, by which the feme is to have a moiety, if there be no issue between her and her husband, and the third part if there be issue had, and declareth that her husband died without issue had between them; if this count should be hardliest construed against the party, it should be intended that her husband had issue by another wife, though not by her, in which case the feme is but to have the third part likewise; but that shall not be so intended, because it is matter of reply to be shewed of the other side.

And so it is of all other rules of pleadings, these being sufficient not for the exact expounding of these other rules, but *obiter* to shew how this rule which we handle is put by when it meets with any other rule.

As for acts of parliament, verdicts, judgments, *etc.* which are not words of parties, in them this rule hath no place at all, neither in devises and wills, upon several reasons; but more especially it is to be noted, that in evidence it hath no place, which yet seems to

have some affinity with pleadings, especially when demurrer is joined upon the evidence.

And therefore if land be given by will by H. C. to his son I. C. and the heirs males of his body begotten; the remainder to F. C. and the heirs males of his body begotten: the remainder to the heirs males of the body of the devisor; the remainder to his daughter S. C. and the heirs of her body, with a clause of perpetuity; and the question comes upon the point of forfeiture in an assize taken by default, and evidence is given, and demurrer upon evidence, and in the evidence given to maintain the entry of the daughter upon a forfeiture, it is not set forth nor averred that the devisor had no other issue male, yet the evidence is good enough, and it shall be so intended; and the reason thereof cannot be, because a jury may take knowledge of matters not within the evidence; and the court contrariwise cannot take knowledge of any matter not within the pleas; for it is clear that if the evidence had been altogether remote, and not proving the issue there, although the jury might find it, yet a demurrer may well be taken upon the evidence. 13. 14 R. P. 412.

But I take the reason of difference between pleadings, which are but openings of the case, and evidence which are the proofs of an issue, to be, that pleadings being but to open the verity of the matter in fact indifferently on both parts, have no scope and conclusion to direct the construction and intendment of them, and therefore must be certain; but in evidence and proofs the issue, which is the state of the question and conclusion, shall incline and apply all the proofs as tending to that conclusion.

Another reason is, that pleadings must be certain, because the adverse party may know whereto to answer, or else he were at a mischief, which mischief is remedied by a demurrer; but in evidence if it be short, impertinent, or uncertain, the adverse party is at no mischief, because it is to be thought that the jury will pass against him; yet nevertheless because the jury is not compellable to supply defect of evidence out of their own knowledge, though it be in their liberty so

to do; therefore the law alloweth a demurrer upon evidence also.

REGULA IV.

Quod sub certa forma concessum vel reservatum est, non trahitur ad valorem vel compensationem.

THE law permitteth every man to part with his own interest, and to qualify his own grant, as it pleaseth himself; and therefore doth not admit any allowance or recompence, if the thing be not taken as it is granted.

17 H. 6. 10. So in all profits *a prender*, if I grant common for ten beasts, or ten loads of wood out of my coppice, or ten loads of hay out of my meads, to be taken for three years; he shall not have common for thirty beasts, or thirty loads of wood or hay, the third year, if he forbear for the space of two years: here the time is certain and precise.

So if the place be limited, as if I grant estovers to be spent in such a house, or stone towards the reparation of such a castle; although the grantee do burn of his fuel and repair of his own charge, yet he can demand no allowance for that he took it not.

So if the kind be specified, as if I let my park reserving to myself all the deer and sufficient pasture for them, if I do decay the game whereby there is no deer, I shall not have quantity of pasture answerable to the feed of so many deer as were upon the ground when I let it; but am without any remedy except I will replenish the ground again with deer.

But it may be thought that the reason of these cases is the default and laches of the grantor, which is not so.

For put the case that the house where the estovers should be spent be overthrown by the act of God, as by tempest, or burnt by the enemies of the king, yet there is no recompence to be made.

And in the strongest case where it is in default of the grantor, yet he shall make void his own grant ra-

ther than the certain form of it should be wrested to an equity or valuation.

As if I grant common *ubicunque averia mea ierint*, the commoner cannot otherwise intitle himself, except that he aver that in such grounds my beasts have gone and fed; and if I never put in any, but occupy my grounds otherwise, he is without remedy; but if I once put in, and after by poverty or otherwise desist, yet the commoner may continue; contrariwise, if the words of the grant had been *quandocunque averia mea ierint*, for there it depends continually upon the putting in of my beasts, or at least the general seasons when I put them in, not upon every hour or moment. 9 H. 6. 36.

But if I grant *tertiam advocationem* to I. S. if he neglect to take his turn *ea vice*, he is without remedy: but if my wife be before intitled to dower, and I die, then my heir shall have two presentments, and my wife the third, and my grantee shall have the fourth; and it doth not impugn this rule at all, because the grant shall receive that construction at the first that it was intended such an avoidance as may be taken and enjoyed; as if I grant *proximam advocationem* to I. D. and then grant *proximam advocationem* to I. S. this shall be intended the next to the next, that is the next which I may lawfully grant or dispose. 29 H. 8. Dy. 35.

But if I grant *proximam advocationem* to I. S. and I. N. is incumbent, and I grant by precise words, *illam advocationem, quæ post mortem, resignationem, translationem, vel deprivationem I. N. immediate fore contigerit;* now this grant is merely void, because I had granted that before, and it cannot be taken against the words.

REGULA V.

Necessitas inducit privilegium quoad jura privata.

THE law chargeth no man with default where the act is compulsory and not voluntary, and where there is not a consent and election; and therefore if either an impossibility be for a man to do otherwise, or so great a perturbation of the judgment and reason as in

4 Ed. 6. cond. 9. 6. presumption of law man's nature cannot overcome, such necessity carrieth a privilege in itself.

Necessity is of three sorts, necessity of conservation of life, necessity of obedience, and necessity of the act of God, or a stranger.

Stamf. First, for conservation of life: if a man steal viands to satisfy his present hunger, this is no felony nor larceny.

So if divers be in danger of drowning by the casting away of some boat or bark, and one of them get to some plank, or on the boat's side to keep himself above water, and another to save his life thrust him from it, whereby he is drowned; this is neither *se defendendo* nor by misadventure, but justifiable.

Con. 13. perBrooke. 15 H. 7. 2. per Keble. 14H.7. 29. per Read. 4 Ed. 6. pl. condition. 4Ed. 6. 20. condition. So if divers felons be in a gaol, and the gaol by casualty is set on fire, whereby the prisoners get forth; this is no escape, nor breaking of prison.

So upon the statute, that every merchant that setteth his merchandise on land without satisfying the customer or agreeing for it, which agreement is construed to be in certainty, shall forfeit his merchandise, and it is so that by tempest a great quantity of the merchandise is cast over-board, whereby the merchant agrees with the customer by estimation, which falleth out short of the truth, yet the over quantity is not forfeited by reason of the necessity; where note, that necessity dispenseth with the direct letter of a statute law.

Lit. pl. 4. 19. 12H.4. 20. 14H.4. 30. B. 38 H.6. 11. 28 H. 6. 8. 29 H.6.50. So if a man have right to land, and do not make his entry for terror of force, the law allows him a continual claim, which shall be as beneficial to him as an entry; so shall a man save his default of appearance by *crestine de eau*, and avoid his debt by *duresse*, whereof you shall find proper cases elsewhere.

Stamf.26.2 Ed.3. 160. Cor.Fitzh. The second necessity is of obedience; and therefore where baron and feme commit a felony, the feme can neither be principal nor accessary; because the law intends her to have no will, in regard of the subjection and obedience she oweth to her husband.

So one reason among others why ambassadors are used to be excused of practices against the state where they reside, except it be in point of conspiracy, which is against the law of nations and society, is, because

non constat whether they have it *in mandatis*, and then they are excused by necessity of obedience.

So if a warrant or precept come from the king to fell wood upon the ground whereof I am tenant for life or for years, I am excused in waste.

The third necessity is of the act of God, or of a stranger, as if I be particular tenant for years of a house, and it be overthrown by grand tempest, or thunder and lightning, or by sudden floods, or by invasion of enemies, or if I have belonging unto it some cottages which have been infected, whereby I can procure none toinhabit them, no workmen to repair them, and so they fall down; in all these cases I am excused in waste: but of this last learning when and how the act of God and strangers do excuse men, there be other particular rules.

B. 48 Ed. 3. 6. B. Wast. 31. 42 Ed. 3. 6. 19 Ed. 3. per Fitz. Wast. 30. 32 Ed. 3. Fitzh. Wast. 105. 44 Ed. 3. 21.

But then it is to be noted, that necessity privilegeth only *quoad jura privata*, for in all cases if the act that should deliver a man out of the necessity be against the commonwealth, necessity excuseth not; for *privilegium non valet contra rempublicam:* and as another saith, *necessitas publica est major quam privata:* for death is the last and farthest point of particular necessity, and the law imposeth it upon every subject, that he prefer the urgent service of his prince and country before the safety of his life: as if in danger of tempest those that are in a ship throw overboard other mens goods, they are not answerable; but if a man be commanded to bring ordnance or munition to relieve any of the king's towns that are distressed, then he cannot for any danger of tempest justify the throwing them overboard; for there it holdeth which was spoken by the Roman, when he alleged the same necessity of weather to hold him from embarking, *Necesse est ut eam, non ut vivam.* So in the case put before of husband and wife, if they join in committing treason, the necessity of obedience doth not excuse the offence as it doth in felony, because it is against the commonwealth.

So if a fire be taken in a street, I may justify the pulling down of the wall or house of another man to save the row from the spreading of the fire; but if I be assailed in my house, a city or town, and be

13 H. 8. 16. per Shelly.

distressed, and to save mine own life I set fire on mine own house, which spreadeth and taketh hold on the other houses adjoining, this is not justifiable, but I am subject to their action upon the case, because I cannot rescue mine own life by doing any thing against the commonwealth: but if it had been but a private trespass, as the going over another's ground, or the breaking of his inclosure when I am pursued, for the safeguard of my life, it is justifiable.

12H.8.10. perBrooke. 22 Ass. pl. 56. 6. E. 4. 7. per Sares.

This rule admitteth an exception when the law intendeth some fault or wrong in the party that hath brought himself into the necessity; so that it is *necessitas culpabilis*. This I take to be the chief reason why *seipsum defendendo* is not matter of justification, because the law intends it hath a commencement upon an unlawful cause, because quarrels are not presumed to grow but upon some wrongs in words or deeds on either part, and the law thinking it a thing hardly tri-able in whose default the affray or quarrel began, supposeth the party that kills another in his own defence not to be without malice; and therefore as it doth not touch him in the highest degree, so it putteth him to sue out his pardon of course, and punisheth him by forfeiture of goods: for where there can be no malice nor wrong presumed, as where a man assails me to rob me, and I kill him; or if a woman kill him that assaileth to ravish her, it is justifiable without pardon.

4 H. 7. 2. Stamford, 21. qu. 15.

So the common case proveth this exception, that is, if a madman commit a felony, he shall not lose his life for it, because his infirmity came by the act of God: but if a drunken man commit a felony, he shall not be excused, because his imperfection came by his own default; for the reason of loss and deprivation of will and election by necessity and by infirmity is all one, for the lack of *arbitrium solutum* is the matter: and therefore as *necessitas culpabilis* excuseth not, no more doth *infirmitas culpabilis*.

21H.7.13. Stamf. 16.

REGULA VI.

Corporalis injuria non recipit æstimationem de futuro.

THE law, in many cases that concern lands or goods doth deprive a man of his present remedy, and turneth

him over to some further circuit of remedy, rather than to suffer an inconvenience: but if it be a question of personal pain, the law will not compel him to sustain it and expect a remedy, because it holdeth no damages a sufficient recompence for a wrong which is corporal.

As if the sheriff make a false return that I am summoned, whereby I lose my land; yet because of the inconvenience of drawing all things to incertainty and 5 Ed.4.80. delay, if the sheriff's return should not be credited, I am excluded of any averment against it, and am put to mine action of deceit against the sheriff and somners: 3 H. 6. 3. but if the sheriff upon a *capias* return a *cepi corpus, et quod est languidus in prisona*, there I may come in and falsify the return of the sheriff to save my imprisonment.

So if a man menace me in my goods, and that he will burn certain evidences of my land which he hath in his hand, if I will not make unto him a bond, yet if I enter into bond by this terror, I cannot avoid it by plea, because the law holdeth it an inconvenience to avoid specialty by such matter of averment; and therefore I am put to mine action against such menacer: but if he restrain my person, or threaten me with bat- 7 Ed.4.21. tery, or with burning of my house, which is a safety and protection to my person, or with burning an instrument of manumission, which is evidence of my enfranchisement; if upon such menace or duresse I enter into a bond, I shall avoid it by plea.

So if a trespasser drive away my beasts over ano- 13 H.8. 5. ther's ground, I pursue them to rescue them, yet am I 21H.7.28. trespasser to the stranger upon whose ground I come: but if a man assail my person, and I fly over another's ground, now am I no trespasser.

This ground some of the canonists do aptly infer out of the saying of Christ, *Amen, est corpus supra vestimentum*, where they say *vestimentum* comprehendeth all outward things appertaining to a man's condition, as lands and goods, which, they say, are not in the same degree with that which is corporal; and this was the reason of the ancient *lex*

talionis, oculus pro oculo, dens pro dente, so that by that law *corporalis injuria de præterito non recipit æstimationem:* but our law, when the injury is already executed and inflicted, thinketh it best satisfaction to the party grieved to relieve him in damages, and to give him rather profit than revenge; but it will never force a man to tolerate a corporal hurt, and to depend upon that same inferior kind of satisfaction, *ut in damnagiis.*

REGULA VII.

Excusat aut extenuat delictum in capitalibus, quod non operatur idem in civilibus.

In capital causes *in favorem vitæ,* the law will not punish in so high a degree, except the malice of the will and intention appear; but in civil trespasses and injuries that are of an inferior nature, the law doth rather consider the damage of the party wronged than the malice of him that was the wrong-doer: and therefore,

The law makes a difference between killing a man upon malice fore-thought, and upon present heat: but if I give a man slanderous words, whereby I damnify him in his name and credit, it is not material whether I use them upon sudden choler and provocation, or of set malice, but in an action upon the case I shall render damages alike.

So if a man be killed by misadventure, as by an arrow at butts, this hath a pardon of course; but if a man be hurt or maimed only, an action of trespass lieth, though it be done against the party's mind and will, and he shall be punished for the same as deeply as if he had done it of malice.

Stamf. 16. 6 Ed. 4. 7.

So if a surgeon authorised to practise do through negligence in his cure cause the party to die, the surgeon shall not be brought in question for his life; and yet if he do only hurt the wound, whereby the cure is cast back, and death ensues not, he is subject to an action upon the case for his misfaisance.

Stamf. 16. B.

So if baron and feme be, and they commit felony together, the feme is neither principal nor accessary,

in regard of her obedience to the will of her husband: but if baron and feme join in a trespass upon land or otherwise, the action may be brought against them both.

So if an infant within years of discretion, or a madman, kill another, he shall not be impeached thereof: but if they put out a man's eye, or do him like corporal hurt, he shall be punished in trespass. B.3.H.7.1. Stamf. 16. B.

So in felonies the law admitteth the difference of principal and accessary, and if the principal die, or be pardoned, the proceeding against the accessary faileth; but in trespass, if one command his man to beat another, and the servant after the battery die, yet an action of trespass stands good against the master. 35 H.6.11. 17 H.4.19. Com: 98.

REGULA VIII.

Æstimatio præteriti delicti ex post facto nunquam crescit.

THE law construeth neither penal laws nor penal facts by intendments, but considereth the offence in degree, as it standeth at the time when it is committed; so as if a matter or circumstance be subsequent, which laid together with the beginning should seem to draw to it a higher nature, yet the law doth not extend or amplify the offence.

Therefore if a man be wounded, and the percussor is voluntarily let go at large by the gaoler, and after, death ensueth of the hurt, yet this is no felonious escape in the gaoler. 11H.4.12.

So if the villain striketh mortally the heir apparent of the lord, and the lord dieth before, and the person hurt who succeedeth to be lord to the villain dieth after, yet this is no petty treason.

So if a man compasseth and imagineth the death of one that after cometh to be king of the land, not being any person mentioned within the statute of 21 Ed. III. this imagination precedent is not high treason.

So if a man use slanderous speeches upon a person to whom some dignity after descends that maketh him peer of the realm, yet he shall have but a simple action

of the case, and not in the nature of a *scandalum magnatum* upon the statute.

So if John Stile steal six pence from me in money, and the queen by her proclamation doth raise monies, that the weight of silver in the piece now of six pence should go for twelve pence, yet this shall remain petty larceny, and not felony: and yet in all civil reckonings the alteration shall take place; as if I contract with a labourer to do some work for twelve pence, and the inhancing of money cometh before I pay him, I shall satisfy my contract with a six penny piece being so raised.

So if a man deliver goods to one to keep, and after retain the same person into his service, who afterwards goeth away with his goods, this is no felony by the statute of 21 H. VIII. because he was not servant at that time.

28 H. 8. pl. 2.

In like manner if I deliver goods to the servant of I. S. to keep, and after die, and make I. S. my executor; and before any new commandment or notice of I. S. to his servant for the custody of the same goods, his servant goeth away with them, this is also out of the same statute.

But note that it is said *præteriti delicti;* for an accessary before the act is subject to all the contingencies pregnant of the fact, if they be pursuances of the same fact: as if a man command or counsel one to rob a man, or beat him grievously, and murder ensue, in either case he is accessary to the murder, *quia in criminalibus præstantur accidentia.*

18 Eliz. com. 175.

REGULA IX.

Quod remedio destituitur ipsa re valet si culpa absit.

THE benignity of the law is such, as, when to preserve the principles and grounds of law it depriveth a man of his remedy without his own fault, it will rather put him in a better degree and condition than in a worse; for if it disable him to pursue his action, or to make his claim, sometimes it will give him the thing itself by operation of law without any act of his

own, sometimes it will give him a more beneficial remedy.

And therefore if the heir of the disseisor which is in by descent make a lease for life, the remainder for life unto the disseisee, and the lessee for life die, now the frank tenement is cast upon the disseisee by act in law, and thereby he is disabled to bring his *præcipe* to recover his right; whereupon the law judgeth him in of his ancient right as strongly as if it had been recovered and executed by action, which operation of law is by an ancient term and word of law called a *remitter;* but if there may be assigned any default or laches in him, either in accepting freehold, or accepting the interest that draws the freehold, then the law denieth him any such benefit. Lit.pl.683.

And therefore if the heir of the disseisor make a lease for years, the remainder in fee to the disseisee, the disseisee is not remitted, and yet the remainder is in him without his own knowledge or assent: but because the freehold is not cast upon him by act in law, it is no remitter. *Quod nota.* Lit.pl.682.

So if the heir of the disseisor infeoff the disseisee and a stranger, and make livery to the stranger, although the stranger die before any agreement or taking of profits by the disseisee, yet he is not remitted; because though a moiety be cast upon him by survivor, yet that is but *jus accrescendi*, and it is no casting of the freehold upon him by act in law, but he is still an immediate purchaser, and therefore no remitter. Lit.pl.685.

So if the husband be seised in the right of his wife, and discontinue and dieth, and the feme takes another husband, who takes a feoffment from the discontinuee to him and his wife, the feme is not remitted; and the reason is, because she was once sole, and so a laches in her for not pursuing her right: but if the feoffment taken back had been to the first husband and herself, she had been remitted. Lit.pl.665.

Yet if the husband discontinue the lands of the wife, and the discontinuee make a feoffment to the use of the husband and wife, she is not remitted; but that is upon a special reason, upon the letter of the statute

of 27 H. VIII. of uses, that willeth that the *cestuy que use* shall have the possession in quality, form and degree as he had the use; but that holdeth place only upon the first vestre of the use: for when the use is
34 H. 8. absolutely once executed and vested, then it doth insue merely the nature of possessions; and if the discontinuee had made a feoffment in fee to the use of I. S. for life, the remainder to the use of the baron and feme, and lessee for life die, now the feme is remitted, *causa qua supra.*

Also if the heir of the disseisor make a lease for life, the remainder to the disseisee, who chargeth the remainder, and lessee for life dies, the disseisee is not remitted; and the reason is, his intermeddling with this wrongful remainder, whereby he hath affirmed the same to be in him, and so accepted it: but if the heir of the disseisor had granted a rent charge to the disseisee, and afterwards made a lease for life, the remainder to the disseisee, and the lessee for life had died, the disseisee had been remitted; because there appeareth no assent or acceptance of any estate in the freehold, but only of a collateral charge.

So if the feme be disseised, and intermarry with the disseisor, who makes a lease for life, rendring rent,
6 Ed. 3. 17. and dieth, leaving a son by the same feme, and the
Cond. 3. 67. son accepts the rent of lessee for life, and then the feme dies, and the lessee for life dies, the son is not
28 H. 8. pl. 207. remitted; and yet the frank tenement was cast upon him by act in law, but because he had agreed to be in the tortious reversion by acceptance of the rent, therefore no remitter.

So if tenant in tail discontinue, and the discontinuee make a lease for life, the remainder to the issue in tail being within age, and at full age the lessee for life surrendereth to the issue in tail, and tenant in tail die, and lessee for life die, yet the issue is not remitted; and yet if the issue had accepted a feoffment within age, and had continued the taking of the profits when he came of full age, and then the tenant in tail had died, notwithstanding his taking of the profits he had been remitted; for that which guides the remitter, is,

if he be once in of the freehold without any laches: as if the heir of the disseisor enfeoffs the heir of the disseisee, who dies, and it descends to a second heir, upon whom the frank tenement is cast by descent, who enters and takes the profits, and then the disseisee dies, this is no remitter, *causa qua supra.*

And if tenant in tail discontinue for life, and take a surrender of the lessee, now is he remitted and seised again by force of the tail, and yet he cometh in by his own act: but this case differeth from all the other cases; because the discontinuance was but particular at first, and the new gained reversion is but by intendment and necessity of law; and therefore is knit as it were *ab initio,* with a limitation to determine whensoever the particular discontinuance endeth, and the estate cometh back to the ancient right. Lit.pl.636.

But now we do proceed from cases of remitter, which is a great branch of this rule, to other cases: if executors do redeem goods pledged by their testator with their own money, the law doth convert so much goods as amount to the value of that they laid forth, to themselves in property, and upon a plea of fully administered it shall be allowed: and the reason is, because it may be matter of necessity for the well administring the goods of the testator, and executing of their trust, that they disburse money of their own: for else perhaps the goods would have been forfeited, and he that had them in pledge would not accept other goods but money, and so it is a liberty which the law gives them, and then they cannot have any suit against themselves; and therefore the law gives them leave to retain so much goods by way of allowance; and if there be two executors, and one of them pay the money, he may also retain against his companion, if he have notice thereof. 6H.8.pl.3. Dy.

But if there be an overplus of goods, above the value of that he hath disbursed, then ought he by his claim to determine what goods he doth elect to have in value; or else before such election, if his companion do sell all the goods, he hath no remedy but in the spiritual court: for to say he should be tenant in 3 Eliz.187. pl. 6.

common with himself and his companion *pro rata* of that he doth lay out, the law doth reject that course for intricateness.

29 H. 8. pl. 7. in fine. 22 Ass. 52. F. Rec. in value 23.

So if I. S. have a lease for years worth 20*l.* by the year, and grant unto I. D. a rent charge of 10*l.* a year, and after make him my executor; now I. D. shall be charged with assets 10*l.* only, and the other 10*l.* shall be allowed and considered to him; and the reason is, because the not refusing shall be accounted no laches to him, because an executorship is *pium officium*, and matter of conscience and trust, and not like a purchase to a man's own use.

12 H. 4. 22. Cond. 185. 2 H. 7. 5. 37 H. 6. 32.

Like law is, where the debtor makes the debtee his executor, the debt shall be considered in the assets, notwithstanding it be a thing in action.

6 E. 6. cond. 138. 6. Lit. pl. 352.

So if I have a rent charge, and grant that upon condition, now though the condition be broken, the grantee's estate is not defeated till I have made my claim; but if after any such grant my father purchase the land, and it descend to me, now if the condition be broken, the rent ceaseth without claim: but if I had purchased the land myself, then I had extincted mine own condition, because I had disabled myself to make my claim: and yet a condition collateral is not suspended by taking back an estate; as if I make a feoffment in fee, upon condition that I. S. shall marry my daughter, and take a lease for life from my feoffee, if the feoffee break the condition I may claim to hold in by my fee-simple: but the case of the charge is otherwise, for if I have a rent charge issuing out of twenty acres, and grant the rent over upon condition, and purchase but one acre, the whole condition is extinct, and the possibility of the rent, by reason of the condition, is as fully destroyed as if the rent had been in me in *esse*.

20 H. 7. per Pol. 35 H. 6. Fitz. Barr. 162.

30 H. 6. Fitz. Grants 91.

So if the Queen grant to me the wardship of I. S. the heir of I. S. when it falleth; because an action of covenant lieth not against the Queen, I shall have the thing myself in interest.

But if I let land to I. S. rendring rent with condition of re-entry, and I. S. be attainted, whereby the lease

cometh to the King, now my demand upon the land is gone, which should give me benefit of re-entry, and yet I shall not have it reduced without demand; and the reason of the difference is, because my condition in this case is not taken away in right, but suspended only by the privilege of the possession; for if the King grant the lease over, the condition is revived as it was. 7 H. 6. 40.

Also if my tenant for life grant his estate to the Queen, now if I will grant my reversion, the Queen is not compellable to atturn, therefore it shall pass by grant by deed without atturnment.

So if my tenant for life be, and I grant my reversion *pur autre vie*, and the grantee die, living *cestuy que vie*, now the privity between tenant for life and me is not restored, and I have no tenant in *esse* to atturn; therefore I may pass my reversion without atturnment. 9 Ed. 2. Fitz. Atturnments 18.

So if I have a nomination to a church, and another hath the presentation, and the presentation comes to the King, now because the King cannot be attendant, my nomination is turned to an absolute patronage.

So if a man be seised of an advowson, and take a wife, and after title of dower given he join in impropriating the church, and dieth; now because the feme cannot have the third turn because of the perpetual incumbency, she shall have all the turns during her life; for it shall not be disimpropriated to the benefit of the heir contrary to the grant of tenant in fee-simple. 6 Ed. 6. Dy. 92.

But if a man grant the third presentment to I. S. and his heirs, and impropriate the advowson, now the grantee is without remedy, for he took his grant subject to that mischief at the first: and therefore it was his laches, and therefore not like the case of the dower; and this grant of the third avoidance is not like *tertia pars advocationis*, or *medietas advocationis* upon a tenancy in common of the advowson: for if two tenants in common be, and an usurpation be had against them, and the usurper do impropriate, and one of the tenants in common do release, and the other bring

his writ of right *de medietate advocationis*, and recover; now I take the law to be, that because tenants in common ought to join in presentments, which cannot now be, he shall have the whole patronage: for neither can there be an apportionment that he should present all the turns, and his incumbent to have but a moiety of the profits, nor yet the act of impropriation shall not be defeated. But as if two tenants in common be of a ward, and they join in a writ of right of ward, and one release, the other shall recover the entire ward, because it cannot be dissevered: so shall it be in the other case, though it be of inheritance, and though he bring his action alone.

45 Ed. 3. 10.

Also if a disseisor be disseised, and the mesne disseisee release to the second disseisor upon condition, and a descent be cast, and the condition broken; now the mean disseisor, whose right is revived, shall enter notwithstanding this descent, because his right was taken away by the act of a stranger.

But if I devise land by the statute of 32 H. VIII. and the heir of the devisor enters and makes a feoffment in fee, and feoffee dieth seised, this descent binds, and there shall not be a perpetual liberty of entry, upon the reason that he never had seisin whereupon he might ground his action, but he is at mischief by his own laches: and the like law of the Queen's patentee; for I see no reasonable difference between them and him in the remainder, which is Littleton's case.

41 Ed. 3. 10.

But note, that the law by operation and matter in fact will never countervail and supply a title grounded upon a matter of record; and therefore if I be intitled unto a writ of error, and the land descend unto me, I shall never be remitted, no more shall I be unto an attaint, except I may also have a writ of right.

So if upon my avowry for services, my tenant disclaim where I may have a writ of right as upon disclaimer, if the land after descend to me, I shall never be remitted.

25 H. 8. Dy. 1. 7.

REGULA X.

Verba generalia restringuntur ad habilitatem rei vel personam.

It is a rule that the King's grants shall not be taken or construed to a special intent; it is not so with the grants of a common person, for they shall be extended as well to a foreign intent as to a common intent; but yet with this exception, that they shall never be taken to an impertinent or a repugnant intent: for all words, whether they be in deeds or statutes, or otherwise, if they be general and not express and precise, shall be restrained unto the fitness of the matter and the person.

As if I grant common *in omnibus terris meis* in D. if I have in D. both open grounds and several, it shall not be stretched to common in my several, much less in my garden or orchard. Perk. pl. 108.

So if I grant to a man *omnes arbores meas crescentes supra terras meas* in D. he shall not have apple-trees, nor other fruit-trees growing in my gardens or orchards, if there be any other trees upon my grounds. 14 H. 8. 2.

So if I grant to I. S. an annuity of 10*l.* a year *pro consilio impenso et impendendo,* if I. S. be a physician, it shall be understood of his counsel in physic; and if he be a lawyer, of his counsel in law. 41 Ed. 3. 6. et 19.

So if I do let a tenement to I. S. near my dwelling-house in a borough, provided that he shall not erect nor use any shop in the same without my licence, and afterwards I license him to erect a shop, and I. S. is then a millener, he shall not by virtue of these general words erect a joiner's shop.

So the statute of chantries, that willeth all lands to be forfeited, that were given or employed to a superstitious use, shall not be construed of the glebe lands of parsonages: nay farther, if lands be given to the parson and his successors of D. to say a mass in his church of D. this is out of the statute, because it shall be intended but as augmentation of his glebe; but 16 Eliz. 337. Dyer.

otherwise it had been, if it had been to say a mass in another church than his own.

So the statute of wrecks, that willeth that the goods wrecked where any live domestical creature remains in a vessel, shall be preserved and kept to the use of the owner that shall make his claim by the space of one year, doth not extend to fresh victuals or the like, which is impossible to keep without perishing or destroying it; for in these and the like cases general words may be taken, as was said, to a rare or foreign intent, but never to an unreasonable intent.

REGULA XI.

Jura sanguinis nullo jure civili dirimi possunt.

THEY be the very words of the civil law, which cannot be amended, to explain this rule, *Filius est nomen naturæ, hæres est nomen juris:* therefore corruption of blood taketh away the privity of the one, that is, of the heir, but not of other, that is, of the son; therefore if a man be attainted and be murdered by a stranger, the eldest son shall not have appeal, because the appeal is given to the heir, for the youngest sons who are equal in blood shall not have it; but if an attainted person be killed by his son, this is petty treason, because the privity of a son remaineth: for I admit the law to be, that if the son kill father or mother it is petty treason, and that there remaineth in our laws so much of the ancient footsteps of *potestas patris* and natural obedience, which by the law of God is the very instance itself; and all other government and obedience is taken but by equity, which I add, because some have sought to weaken the law in that point.

35 H. 6. 57, 58. 21 Ed. 3. 17.

Lamb. Jus. p. 293. Fitz. crown. 447.

So if land descend to the eldest son of a person attainted from an ancestor of the mother held in knights service, the guardian shall enter, and oust the father, because the law giveth the father that prerogative in respect he is his son and heir; for of a daughter or of a special heir in tail he shall not have it: but if the son be attainted, and the father covenant in consideration

F. N. Br. fo. 143. De Droit.

of natural love to stand seised of the land to his use, this is good enough to raise an use, because the privity of natural affection remaineth.

So if a man be attainted and have charter of pardon, and be returned of a jury between his son and I. S. the challenge remaineth; so may he maintain any suit of his son, notwithstanding the blood be corrupt.

So by the statute of 21 H. VIII. the ordinary ought to commit administration of his goods that was attainted and purchase his charter of pardon, to his children, though born before the pardon, for it is no question of inheritance: for if one brother of the half blood die, the administration ought to be committed to his other brother of the half blood, if there be no nearer by the father. 5 Ed. 6. Adm. 47.

So if the uncle by the mother be attainted, pardoned, and land descend from the father to the son within age held in socage, the uncle shall be guardian in socage; for that savoureth so little of the privity of heir, as the possibility to inherit shutteth out. 33 H. 6. 55.

But if a feme tenant in tail assent to the ravisher, and have no issue, and her cousin is attainted, and pardoned, and purchaseth the reversion, he shall not enter for a forfeiture. For although the law giveth it not in point of inheritance, but only as a perquisite to any of the blood, so he be next in estate; yet the recompence is understood for the stain of his blood, which cannot be considered when it is once wholly corrupted before. 5 Ed. 4. 50.

So if a villain be attainted, yet the lord shall have the issues of his villain born before or after his attainder; for the lord hath them *jure naturæ* but as the increase of a flock.

Query, Whether if the eldest son be attainted and pardoned, the lord shall have aid of his tenants to make him knight, and it seemeth he shall; for the words of the writ are *filium primogenitum,* and not *filium et hæredem,* and the like writ hath *pur file marrier* who is no heir. F. N. Br. 82. G. Register, fol. 87.

REGULA XII.

Receditur a placitis juris potius, quam injuriæ et delicta maneant impunita.

THE law hath many grounds and positive learnings, which are not of the maxims and conclusions of reason; but yet are learnings received which the law hath set down and will not have called in question; these may be rather called *placita juris* than *regulæ juris;* with such maxims the law will dispense, rather than crimes and wrongs should be unpunished, *quia salus populi suprema lex;* and *salus populi* is contained in the repressing offences by punishment.

Fitz. N. B. 30. Therefore if an advowson be granted to two, and the heirs of one of them, and an usurpation be had, they both shall join in a writ of right of advowson; and yet it is a ground in law, that a writ of right lieth of no less estate than of a fee-simple; but because the tenant for life hath no other several action in the law given him, and also that the jointure is not broken, and so the tenant in fee-simple cannot bring his writ of right alone; therefore rather than he should be deprived wholly of remedy, and this wrong unpunished, he shall join his companion with him, notwithstanding the feebleness of his estate.

46 Ed. 3. 21. But if lands be given to two, and to the heirs of one of them, and they lease in a *præcipe* by default, now they shall not join in a writ of right, because the tenant for life hath a several action, namely, a *Quod ei deforciat*, in which respect the jointure is broken.

27 H. 8. 13. So if tenant for life and his lessor join in a lease for years, and the lessee commit waste, they shall join in punishing the waste, and *locus vastatus* shall go to the tenant for life, and the damages to him in the reversion; and yet an action of waste lieth not for the tenant for life; but because he in the reversion cannot have it alone, because of the mean estate for life, therefore rather than the waste shall be unpunished, they shall join.

45 Ed. 3. 3. 22 H. 6. 24. So if two coparceners be, and they lease the land, and one of them die, and hath issue, and the lessee

commit waste, the aunt and the issue shall join in punishing this waste, and the issue shall recover the moiety of the place wasted, and the aunt the other moiety and the entire damages; and yet *actio injuriarum moritur cum persona*, but *in favorabilibus magis attenditur quod prodest, quam quod nocet.*

So if a man recovers by erroneous judgment, and hath issue two daughters, and one of them is attainted, the writ of error shall be brought against both parceners, notwithstanding the privity fail in the one. 20 Ed. 2 Fitz. F. descent. 16.

Also it is a positive ground, that the accessary in felony cannot be proceeded with, until the principal be tried; yet if a man upon subtlety or malice set a madman by some device upon another to kill him, and he doth so; now forasmuch as the madman is excused because he can have no will nor malice, the law accounteth the inciter as principal, though he be absent, rather than the crime shall go unpunished. 33 Eliz.

So it is a ground in the law, that the appeal of murder goeth not to the heir where the party murdered hath a wife, nor to the younger brother where there is an elder; yet if the wife murder her husband, because she is the party offender, the appeal leaps over to the heir; and so if the son and heir murder his father, it goeth to the second brother. Fitz. Corone 459. Ed. 4. M. 28. 6. Stamf. lib. 2. fol. 60.

But if the rule be one of the higher sort of maxims that are *regulæ rationales*, and not *positivæ*, then the law will rather endure a particular offence to escape without punishment, than violate such a rule.

As it is a rule that penal statutes shall not be taken by equity, and the statute of 1 Ed. VI. enacts that those that are attainted for stealing of horses shall not have their clergy, the judges conceived, that this did not extend to him that stole but one horse, and therefore procured a new act for it 2 Ed. VI. cap. 33. And they had reason for it, as I take the law; for it is not like the case upon the statute of Glocest. that gives an action of waste against him that holds *pro termino vitæ vel annorum.* It is true, if a man hold but for a year he is within the statute; for it is to be noted, that penal statutes are taken strictly and literally only in Cap. 12. Stamf. 2. fol. 125. Plow. 467. Litt. cap. 46. Ed. 3. 21.

the point of defining and setting down the fact and the punishment, and in those clauses that concern them; and not generally in words that are but circumstances and conveyances in putting of the case: and so the diversity; for if the law be, that for such an offence a man shall lose his right hand, and the offender had his right hand cut off in the wars before, he shall not lose his left hand, but the crime shall rather pass unpunished which the law assigned, than the law shall be extended; but if the statute of 1 Ed. VI. had been, that he that should steal a horse should be ousted of his clergy, then there had been no question at all, but if a man had stolen more horses than one, he had been within the statute, *quia omne majus continet in se minus.*

REGULA XIII.

Non accipi debent verba in demonstrationem falsam, quæ competunt in limitationem veram.

THOUGH falsity of addition or demonstration doth no hurt where you give a thing a proper name, yet nevertheless if it stand doubtful upon the words, whether they import a false reference and demonstration, or whether they be words of restraint that limit the generality of the former name, the law will never intend error or falshood.

12 Eliz. 2. Dyer, 291. 23 Eliz. Dy. 376. 7 Ed. 6. Dy. 56.

And therefore if the parish of Hurst do extend into the counties of Wiltshire and Berkshire, and I grant my close called Callis, situate and lying in the parish of Hurst in the county of Wiltshire, and the truth is, that the whole close lieth in the county of Berkshire; yet the law is, that it passeth well enough, because there is a certainty sufficient in that I have given it a proper name which the false reference doth not destroy, and not upon the reason that these words, "in the county of Wiltshire," shall be taken to go to the parish only, and so to be true in some sort, and not to the close, and so to be false: For if I had granted *omnes terras meas in parochia de Hurst in com. Wiltshire*, and I had no lands in Wiltshire but in Berkshire, nothing had past.

But in the principal case, if the close called Callis had extended part into Wiltshire and part into Berkshire, then only that part had passed which lay in Wiltshire. 9 Ed. 4. 7. 21 Ed. 3. 18. 18 Eliz. 29 Reg.

So if I grant *omnes et singulas terras meas in tenura I. D. quas perquisivi de I. N. in indentura dimissionis fact' I. B. specificat.* If I have land wherein some of these references are true, and the rest false, and no land wherein they are all true, nothing passeth: as if I have land in the tenure of I. D. and purchased of I. N. but not specified in the indenture to I. B. or if I have land which I purchased of I. N. and specified in the indenture of demise to I. B. and not in the tenure of I. D.

But if I have some land wherein all these demonstrations are true, and some wherein part of them are true and part false, then shall they be intended words of true limitation to pass only those lands wherein all these circumstances are true.

REGULA XIV.

Licet dispositio de interesse futuro sit inutilis, tamen fieri potest declaratio præcedens quæ sortiatur effectum interveniente novo actu.

THE law doth not allow of grants except there be a foundation of an interest in the grantor; for the law that will not accept of grants of titles, or of things in action which are imperfect interests, much less will it allow a man to grant or incumber that which is no interest at all, but merely future.

But of declarations precedent before any interest vested the law doth allow, but with this difference, so that there be some new act or conveyance to give life and vigour to the declaration precedent.

Now the best rule of distinction between grants and declarations is, that grants are never countermandable, not in respect of the nature of the conveyance on the instrument, though sometimes in respect of the interest granted they are, whereas declarations are evermore countermandable in their natures.

20 Eliz. 19H.6.62. And therefore if I grant unto you, that if you enter into obligation to me of 100*l.* and after do procure me such a lease, that then the same obligation to be void, and you enter into such obligation unto me, and afterwards do procure such a lease, yet the obligation is simple, because the defeisance was made of that which was not.

27 Ed.3. So if I grant unto you a rent charge out of white acre, and that it shall be lawful for you to distrain in all my other lands whereof I am now seised, and which I shall hereafter purchase; although this be but a liberty of distress, and no rent save only out of white acre, yet as to the lands afterwards to be purchased the clause is void.

29Ed.3.6. 24 Eliz. So if a reversion be granted to I. S. and I. D. a stranger by deed do grant to I. S. that if he purchase the particular estate, he doth atturne to his grantee, this is a void atturnement, notwithstanding he doth afterwards purchase the particular estate.

13,14Eliz. 20,21Eliz. 25 Eliz. But of declarations the law is contrary; as if the disseisee make a charter of feoffment to I. S. and a letter of attorney to enter and make livery and seisin, and deliver the deed of feoffment, and afterwards livery and seisin is made accordingly, this is a good feoffment; and yet he had nothing other than in right at the time of the delivery of the charter; but because a deed of feoffment is but matter of declaration and evidence, and there is a new act which is the livery subsequent, therefore it is good in law.

M. 38. et 39 Eliz.

36 Eliz. So if a man make a feoffment in fee to I. S. upon condition to enfeoff I. N. within certain days, and there are deeds made both of the first feoffment and the second, and letters of attorney accordingly, and both those deeds of feoffment and letters of attorney are delivered at a time, so that the second deed of feoffment and letter of attorney are delivered when the first feoffee hath nothing in the land; and yet if both liveries be made accordingly, all is good.

So if I covenant with I. S. by indenture, that before such a day I will purchase the manor of D. and before the same day I will levy a fine of the same land, and

that the same fine shall be to certain uses which I express in the same indenture; this indenture to lead uses being but matter of declaration, and countermandable at my pleasure, will suffice, though the land be purchased after; because there is a new act to be done, namely, the fine.

But if there were no new act, then otherwise it is; as if I covenant with my son in consideration of natural affection, to stand seised to his use of the lands which I shall afterwards purchase, and I do afterwards purchase, yet the use is void: and the reason is, because there is no act, nor transmutation of possession following to perfect this inception; for the use must be limited by the feoffor, and not by the feoffee, and he had nothing at the time of the covenant. 25 Eliz. 37 Eliz.

So if I devise the manor of D. by special name, of which at that time I am not seised, and after I purchase it, except I make some new publication of my will, this devise is void; and the reason is, because that my death, which is the consummation of my will, is the act of God, and not my act, and therefore no such new act as the law requireth.

But if I grant unto I. S. authority by my deed to demise for years the land whereof I am now seised, or hereafter shall be seised; and after I purchase lands, and I. S. my attorney doth demise them: this is a good demise, because the demise of my attorney is a new act, and all one with a demise by myself.

But if I mortgage land, and after covenant with I. S. in consideration of money which I receive of him, that after I have entered for the condition broken, I will stand seized to the use of the same I. S. and I enter, and this deed is enrolled, and all within the six months, yet nothing passeth, because the enrolment is no new act, but a perfective ceremony of the first deed of bargain and sale; and the law is more strong in that case, because of the vehement relation which the enrolment hath to the time of the bargain and sale, at what time he had nothing but a naked condition. 21 Eliz.

So if two joint-tenants be, and one of them bargain and sell the whole land, and before the enrolment his 6 Ed. 6. Br.

companion dieth, nothing passeth of the moiety accrued unto him by survivor.

REGULA XV.

In criminalibus sufficit generalis malitia intentionis cum facto paris gradus.

ALL crimes have their conception in a corrupt intent, and have their consummation and issuing in some particular fact; which though it be not the fact at the which the intention of the malefactor levelled, yet the law giveth him no advantage of the error, if another particular ensue of as high a nature.

18 Eliz. Sanders case, com. 474.

Therefore if an impoisoned apple be laid in a place to impoison I. S. and I. D. cometh by chance and eateth it, this is murder in the principal that is actor, and yet the malice *in individuo* was not against I. D.

Cr J. peace, fo. 30.

So if a thief find a door open, and come in by night and rob an house, and be taken with the mainour, and breaketh a door to escape, this is burglary; yet the breaking of the door was without any felonious intent, but it is one entire act.

So if a caliver be discharged with a murderous intent at I. S. and the piece break and striketh into the eye of him that dischargeth it, and killeth him, he is *felo de se*, and yet his intention was not to hurt himself; for *felonia de se* and murder are *crimina paris gradus*. For if a man persuade another to kill himself, and be present when he doth so, he is a murderer.

Cr. J. peace, fol. 18, 19.

But *query*, if I. S. lay impoisoned fruit for some other stranger his enemy, and his father or master come and eat it, whether this be petty treason, because it is not altogether *crimen paris gradus?*

REGULA XVI.

Mandata licita accipiunt strictam interpretationem, sed illicita latam et extensivam.

IN the committing of lawful authority to another, a man may limit it as strictly as it pleaseth him, and if

the party authorised do transgress his authority, though it be but in circumstance expressed, it shall be void in the whole act.

But when a man is author and mover to another to commit an unlawful act, then he shall not excuse himself by circumstances not pursued.

Therefore if I make a letter of attorney to I. S. to deliver livery and seisin in the capital messuage, and he doth it in another place of the land; or between the hours of two or three, and he doth it after or before; or if I make the charter of feoffment to I. D. and I. B. and express the seisin to be delivered to I. D. and my attorney deliver it to I. B. in all these cases the act of the attorney, as to execute the estate, is void; but if I say generally to I. D. whom I mean only to enfeoff, and my attorney make it to his attorney, it shall be intended, for it is a livery to him in law.

10 H.7.19. 15, 16. 16 El. Dy. 337. 16 El. Dy. 337. 11 El. Dy. 283. 38 H.8.D. 62.

But on the other side, if a man command I. S. to rob I. D. on Shooters-hill, and he doth it on Gads-hill; or to rob him such a day, and he doth it the next day; or to kill I. D. and he doth it not himself but procureth I. B. to do it; or to kill him by poison, and he killeth him by violence; in all these cases, although the fact be not performed in circumstance, yet he is accessary nevertheless.

But if it be to kill I. S. and he kill I. D. mistaking him for I. S. then the acts are distant in substance, and he is not accessary.

And be it that the acts be of a differing degree, and yet of a kind:

As if one bids I. S. to pilfer away such a thing out of a house, and precisely restrain him to do it some time when he is gotten in without breaking of the house, and yet he breaketh the house; yet he is accessary to the burglary; for a man cannot condition with an unlawful act, but he must at his peril take heed how he put himself into another man's hands.

But if a man bid one to rob I. S. as he goeth to Sturbridge-fair, and he rob him in his house, the variance seemeth to be of substance, and he is not accessary.

10 Eliz. in Sanders case, 475.

REGULA XVII.

De fide et officio judicis non recipitur quæstio; sed de scientia, sive sit error juris sive facti.

THE law doth so much respect the certainty of judgments, and the credit and authority of judges, as it will not permit any error to be assigned that impeacheth them in their trust and office, and in wilful abuse of the same; but only in ignorance, and mistaking either of the law or of the case and matter in fact.

F. N. br. fo. 21. 7 H. 7. 4. And therefore if I will assign for error, that whereas the verdict passed for me, the court received it contrary, and so gave judgment against me, this shall not be accepted.

3 H. 6. Fitz. Ass. 3. So if I will alledge for error, that whereas I. S. offered to plead a sufficient bar, the court refused it, and drove me from it, this error shall not be allowed.

2 M. Dy. 114. But the greatest doubt is where the court doth determine of the verity of the matter in fact; so that it is rather in point of trial than in point of judgment, whether it shall be examined in error.

1 Mar. B. 28 Ass. M. 15. 21 H. 7. 40. 33. As if an appeal of maim be brought, and the court, by the assistance of the chirurgeons, do judge it to be a maim, whether the party grieved may bring a writ of error; and I hold the law to be he cannot.

8 H. 4. 3. So if one of the prothonotaries of the common pleas bring an assize of his office, and alledge fees belonging to the same office in certainty, and issue to be taken upon these fees, this issue shall be tried by the judges by way of examination, and if they determine it for the plaintiff, and he have judgment to recover arrearages accordingly, the defendant can bring no writ of error of this judgment, though the fees in truth be other.

1 Mar. Dy. 89. 5 Mar. Dy. 163.

8 H. 6. 23. 2 El. 285. Dy. 43 Ass. 26. 41 Ass. 5. So if a woman bring a writ of dower, and the tenant plead her husband was alive, this shall be tried by proofs and not by jury, and upon judgment given on either side no error lies.

So if *nul tiel record* be pleaded, which is to be tried by the inspection of the record, and judgment be thereupon given, no error lies. 39 Ass. 9. 5 Ed. 4. 3.

So if in an assize the tenant saith, he is *counte de Dale, et nient nosme counte*, in the writ, this shall be tried by the records of the chancery, and upon judgment given no error lieth. 9 H. 7. 2. 19 H. 6. 52.

So if a felon demand his clergy, and read well and distinctly, and the court who is judge thereof do put him from his clergy wrongfully, error shall never be brought upon the attainder. 22 Ass. pl. 24. 19 Ed. 4. 6.

So if upon judgment given upon confession or default, and the court do assess damages, the defendant shall never bring a writ of error, though the damages be outrageous. 9 Ass. 8. F. N. Br. 21.

And it seems in the case of maim, and some of the other cases, that the court may dismiss themselves of discussing the matter by examination, and put it to a jury, and then the party grieved shall have his attaint; and therefore that the court that doth deprive a man of his action, should be subject to an action; but that notwithstanding the law will not have, as it was said in the beginning, the judges called in question in the point of their office when they undertake to discuss the issue, and that is the true reason: for to say that the reason of these cases should be, because trial by the court should be peremptory as trial by certificate, as by the bishop in case of bastardy, or by the marshal of the king, *etc.* the cases are nothing like; for the reason of those cases of certificate is, because if the court should not give credit to the certificate, but should re-examine it, they have no other mean but to write again to the same lord bishop, or the same lord marshal, which were frivolous, because it is not to be presumed they would differ from their own former certificate; whereas in these other cases of error the matter is drawn before a superior court, to re-examine the errors of an inferior court: and therefore the true reason is, as was said, that to examine again that which the court had tried were in substance to attaint the court. 21 H. 7. 33. 40. 22 Ass. 99. 41 Ass. 29. 11 H. 4. 41. 7 H. 6. 37.

And therefore this is a certain rule in errors, that error in law is ever of such matters as do appear upon record; and error in fact is ever of such matters as are not crossed by the record; as to alledge the death of the tenant at the time of the judgment given, nothing appeareth upon the record to the contrary.

F. N. Br. 21. So when any infant levies a fine, it appeareth not upon the record of the fine that he is an infant, therefore it is an error in fact, and shall be tried by inspection during nonage.

But if a writ of error be brought in the King's Bench of a fine levied by an infant, and the court by inspection and examination do affirm the fine, the infant, though it be during his infancy, shall never bring a writ of error in parliament upon this judgment; not but that error lies after error, but because it doth not appear upon the record that he is now of full age, therefore it can be no error in fact. And therefore if a man will assign for error that fact, that whereas the judges gave judgment for him, the clerks entred it in the roll against him, this error shall not be allowed; and yet it doth not touch the judges but the clerks: but the reason is, if it be an error, it is an error in fact; and you shall never alledge an error in fact contrary to the record.

2 R. 3. 20. F. N. Br. 21. 9 Ed. 4. 3.

REGULA XVIII.

Persona conjuncta æquiparatur interesse proprio.

THE law hath this respect of nature and conjunction of blood, as in divers cases it compareth and matcheth nearness of blood with consideration of profit and interest; yea, and in some cases alloweth of it more strongly.

7 et 8 Eliz. Therefore if a man covenant, in consideration of blood, to stand seised to the use of his brother, or son, or near kinsman, an use is well raised by his covenant without transmutation of possession; nevertheless it is true, that consideration of blood is naught to ground a personal contract upon; as if I contract with my son, that in consideration of blood I will give unto him such a sum of money, this is *nudum pactum*, and no

assumpsit lieth upon it; for to subject me to an action, there needeth a consideration of benefit; but the use the law raiseth without suit or action; and besides, the law doth match real considerations with real agreements and covenants.

So if a suit be commenced against me, my son, or brother, my son or brother may maintain as well as he in remainder for his interest, or his lawyer for his fee; so if my brother have a suit against my nephew or cousin, yet it is at my election to maintain the cause of my nephew or cousin, though the adverse party be nearer unto me in blood. 19 Ed. 4. 5. 14 H. 6. 6. 19 E. 4. 33. 14 H. 7. 2. 22 H. 6. 35. 21 H. 6. 15. 16.

So in challenges of juries, challenge of blood is as good as challenge within distress, and it is not material how far off the kindred be, so the pedigree may be conveyed in certainty, whether it be of the half or whole blood. 22 H. 6. 5. 2 H. 6. 14 et 15 El.

So if a man menace me, that he will imprison or hurt in body my father, or my child, except I make unto him an obligation, I shall avoid this duresse, as well as if the duresse had been to mine own person: and yet if a man menace me, by the taking away or destruction of my goods, this is no good duresse to plead: and the reason is, because the law can make me no reparation of that loss, and so can it not of the other. Com. 428. 21 Ed. 4. 75. 35 H. 6. 17. 18. 18 H. 6. 21. 39 H. 6. 50. 15 Ed. 4. 1. 21 Ed. 4.

So if a man under the years of twenty one, contract for the nursing of his lawful child, this contract is good, and shall not be avoided by infancy, no more than if he had contracted for his own aliments or erudition. 13. 39. H. 6. 51. 7 Ed. 4. 21. 2 Ass. 14. Perk. 4. D. cap. 25.

REGULA XIX.

Non impedit clausula derogatoria, quo minus ab eadem potestate res dissolvantur, à quibus constituuntur.

Acts which are in their nature revocable, cannot by strength of words be fixed and perpetuated; yet men have put in use two means to bind themselves from changing or dissolving that which they have set down, whereof the one is *clausula derogatoria*, the other *interpositio juramenti*, whereof the former is only pertinent to the present purpose.

This *clausula derogatoria* is by the common practical term called *clausula non obstante,* and is of two sorts, *de præterito, et de futuro,* the one weakening and dis-annulling any matter past to the contrary, the other any matter to come; and this latter is that only whereof we speak.

This *clausula de non obstante de futuro,* the law judgeth to be idle and of no force, because it doth deprive men of that which of all other things is most incident to human condition, and that is alteration or repentance.

And therefore if I make my will, and in the end thereof do add such like clause [Also my will is, that if I shall revoke this present will, or declare any new will, except the same shall be in writing, subscribed with the hands of two witnesses, that such revocation or new declaration shall be utterly void; and by these presents I do declare the same not to be my will, but this my former will to stand, any such pretended will to the contrary notwithstanding] yet nevertheless this clause or any the like never so exactly penned, and although it do restrain the revocation but in circumstance and not altogether, is of no force or efficacy to fortify the former will against the second; but I may by parole without writing repeal the same will and make a new one.

28 Ed. 3. cap. 7. 42 Ed. 3. cap. 9. 2 H. 7. 6.

So if there be a statute made that no sheriff shall continue in his office above a year, and if any patent be made to the contrary, it shall be void; and if there be any *clausula de non obstante* contained in such patent to dispense with this present act, that such clause also shall be void; yet nevertheless a patent of the sheriff's office made by the king for term of life, with a *non obstante,* will be good in law contrary to such statute, which pretendeth to exclude *non obstantes;* and the reason is, because it is an inseparable prerogative of the crown to dispense with politic statutes, and of that kind; and then the derogatory clause hurteth not.

So if an act of parliament be made, wherein there is a clause contained that it shall not be lawful for the king, by authority of parliament, during the space of

seven years, to repeal and determine the same act, this is a void clause, and the same act may be repealed within the seven years; and yet if the parliament should enact in the nature of the ancient *lex regia*, that there should be no more parliaments held, but that the king should have the authority of the parliament; this act were good in law, *quia potestas suprema seipsum dissolvere potest, ligare non potest:* for it is in the power of a man to kill a man, but it is not in his power to save him alive, and to restrain him from breathing or feeling; so it is in the power of a parliament to extinguish or transfer their own authority, but not, whilst the authority remains entire, to restrain the functions and exercises of the same authority.

So in 28 of K. H. VIII. chap. 17. there was a statute made, that all acts that passed in the minority of kings, reckoning the same under the years of twenty-four, might be annulled and revoked by their letters patent when they came to the same years; but this act in the first of K. Ed. VI. who was then between the years of ten and eleven, cap. 11. was repealed, and a new law surrogate in place thereof, wherein a more reasonable liberty is given; and wherein, though other laws are made revocable according to the provision of the former law with some new form prescribed, yet that very law of revocation, together with pardons, is made irrevocable and perpetual, so that there is a direct contrariety and repugnancy between these two laws; for if the former stands, which maketh all later laws during the minority of kings revocable without exception of any law whatsoever, then that very law of repeal is concluded in the generality, and so itself made revocable: on the other side, that law making no doubt of the absolute repeal of the first law, though itself were made during minority, which was the very case of the former law in the new provision which it maketh, hath a precise exception, that the law of repeal shall not be repealed.

14 El. Dy. 313.

Pl. Co 563.

But the law is, that the first law by the impertinency of it was void *ab initio et ipso facto* without repeal, as if a law were made, that no new statute

should be made during seven years, and the same statute be repealed within the seven years, if the first statute should be good, then no repeal could be made thereof within that time; for the law of repeal were a new law, and that were disabled by the former law; therefore it is void in itself, and the rule holds, *perpetua lex est, nullam legem humanam ac positivam perpetuam esse; et clausula quæ abrogationem excludit initio non valet.*

Neither is the difference of the civil law so reasonable as colourable, for they distinguish and say that a derogatory clause is good to disable any later act, except you revoke the same clause before you proceed to establish any later disposition or declaration; for they say, that *clausula derogatoria ad alias sequentes voluntates posita in testamento,* viz. *si testator dicat quod si contigerit eum facere aliud testamentum non vult illud valere, operatur quod sequens dispositio ab illa clausula reguletur, et per consequens quod sequens dispositio ducatur sine voluntate, et sic quod non sit attendendum.* The sense is, that where a former will is made, and after a later will, the reason why, without an express revocation of the former will, it is by implication revoked, is because of the repugnancy between the disposition of the former and the later.

But where there is such a derogatory clause, there can be gathered no such repugnancy: because it seemeth the testator had a purpose at the making of the first will to make some shew of a new will, which nevertheless his intention was should not take place: but this was answered before; for if that clause were allowed to be good until a revocation, then could no revocation at all be made, and therefore it must needs be void by operation of law at first. Thus much of *clausula derogatoria.*

REGULA XX.

Actus inceptus, cujus perfectio pendet ex voluntate partium, revocari potest; si autem pendet ex voluntate tertiæ personæ, vel ex contingenti, revocari non potest.

In acts which are fully executed and consummate, the law makes this difference, that if the first parties have put it in the power of a third person, or of a contingency, to give a perfection to their acts, then they have put it out of their own reach and liberty; and therefore there is no reason they should revoke them: but if the consummation depend upon the same consent, which was the inception, then the law accounteth it in vain to restrain them from revoking of it; for as they may frustrate it by omission and *non feisance*, at a certain time, or in a certain sort or circumstance, so the law permitteth them to dissolve it by an express consent before that time, or without that circumstance.

Therefore if two exchange land by deed, or without deed, and neither enter, this may make a revocation or dissolution of the same exchange by mutual consent, so it be by deed, but not by parole; for as much as the making of an exchange needeth no deed, because it is to be perfected by entry, which is a ceremony notorious in the nature of livery; but it cannot be dissolved but by deed, because it dischargeth that which is but title. F. N. Br. 36. 13 H. 7. 13, 14.

So if I contract with I. D. that if he lay me into my cellar three tuns of wine before Mich. that I will bring to his garner twenty quarters of wheat before Christmas, before either of these days the parties may by assent dissolve the contract; but after the first day there is a perfection given to the contract by action on the one side, and they may make cross releases by deed or parole, but never dissolve the contract; for there is a difference between dissolving the contract, and release or surrender of the thing contracted for: as if lessee for twenty years make a lease for ten years, and after 36 Eliz.

he take a new lease for five years, he is in only of his lease for five years, and yet this cannot inure by way of surrender: for a petty lease derived out of a greater cannot be surrendered back again, but it inureth only by dissolution of contract; for a lease of land is but a contract executory from time to time of the profits of the land, to arise as a man may sell his corn or his tithe to spring or to be perceived for divers future years.

But to return from our digression: on the other side, if I contract with you for cloth at such a price as I. S. shall name; there if I. S. refuse to name, the contract is void; but the parties cannot discharge it, because they have put it in the power of the third person to perfect.

11 H. 7. 19. 2 R. 2. F. atturnment. 8.

So if I grant my reversion, though this be an imperfect act before atturnment; yet because the atturnment is the act of a stranger, this is not simply revocable, but by a policy or circumstance in law, as by levying a fine, or making a bargain and sale, or the like.

31 Ed 1. Fitz. Q. Imp. 185. 14 Ed. 4. 2. 38 Ed. 3. 35. 14 Ed. 4. 2.

So if I present a clerk to the Bishop, now can I not revoke this presentation, because I have put it out of myself, that is, in the Bishop, by admissus, to perfect my act begun.

The same difference appeareth in nominations and elections; as if I enfeoff I. S. upon condition to enfeoff such a one as I. D. shall name within a year, and I. D. name I. B. yet before the feoffment, and within the year, I. D. may countermand his nomination, and name again, because no interest passeth out of him. But if I enfeoff I. S. to the use of such a one as I. D. shall name within a year, then if I. D. name I. B. it is not revocable, because the use passeth presently by operation of law.

So in judicial acts the rule of the civil law holdeth, *sententia interlocutoria revocari potest, definitiva non potest;* that is, that an order may be revoked, but a judgment cannot; and the reason is, because there is a title of execution or of bar given presently unto the party upon judgment, and so it is out of the judge *to revoke, in* courts ordered by the common law.

REGULA XXI.

Clausula vel dispositio inutilis per præsumptionem vel causam remotam, ex post facto non fulcitur.

Clausula vel dispositio inutilis are said, when the act or the words do work or express no more than law by intendment would have supplied; and therefore the doubling or iterating of that and no more, which the conceit of the law doth in a sort prevent and preoccupate, is reputed nugation, and is not supported and made of substance either by a foreign intendment of some purpose, in regard whereof it might be material, nor upon any cause or matter emerging afterwards, which may induce an operation of those idle words or acts.

And therefore if a man devise land at this day to his son and heir, this is a void devise, because the disposition of law did cast the same upon the heir by descent; and yet if it be knight's service land, and the heir within age, if he take by the devise, he shall have two parts of the profits to his own use, and the guardian shall have benefit but of the third; but if a man devise land to his two daughters, having no sons, then the devise is good, because he doth alter the disposition of the law; for by the law they should take in coparcenary, but by the devise they shall take jointly; and this is not any foreign collateral purpose, but in point of taking of estate.

32 H. 8. Geord. 198. R. 2. Br. devises 1.

29 H. 8. Dy. 12.

So if a man make a feoffment in fee to the use of his last will and testament, these words of special limitation are void, and the law reserveth the ancient use to the feoffer and his heirs; and yet if the words might stand, then should it be authority by his will to declare and appoint uses, and then though it were knight's service land, he might dispose the whole. As if a man make a feoffment in fee, to the use of the will and testament of a stranger, there the stranger may declare an use of the whole by his will, notwithstanding it be knight's service land; but the reason of the principal case is, because uses before the statute of

21 were to have been disposed by will, and therefore before that statute an use limited in the form aforesaid, was but a frivolous limitation, in regard that the old use which the law reserved was deviseable; and the statute of 27 altereth not the law, as to the creating and limiting of any use, and therefore after that statute, and before the statute of wills, when no lands could have been devised, yet it was a void limitation as before, and so continueth to this day.

19 H. 8. 11.
5 Ed. 4. 8.

But if I make a feoffment in fee to the use of my last will and testament, thereby to declare any estate tail and no greater estate, and after my death, and after such estate declared shall expire, or in default of such declaration then to the use of I. S. and his heirs, this is a good limitation; and I may by my will declare an use of the whole land to a stranger, though it be held in knight's service, and yet I have an estate in fee simple by virtue of the old use during life.

19 H. 8. 11.
5 Ed. 4. 8.

So if I make a feoffment in fee to the use of my right heirs, this is a void limitation, and the use reserved by the law doth take place: and yet if the limitation should be good the heir should come in by way of purchase, who otherwise cometh in by descent; but this is but a circumstance which the law respecteth not, as was proved before.

32 H. 8. 93. B.
20 H. 8. 8. Dy.
7 El. 237. Dy.

But if I make a feoffment in fee to the use of my right heirs, and the right heirs of I. S. this is a good use, because I have altered the disposition of law; neither is it void for a moiety, but both our right heirs when they come in being shall take by joint purchase; and he to whom the first falleth shall take the whole, subject nevertheless to his companions title, so it have not descended from the first heir to the heir of the heir: for a man cannot be joint-tenant claiming by purchase, and the other by descent, because they be several titles.

10 El. 274. Dy.
2 Ed. 3. 29.
30 Ed. 3. Fitz. Devise 9.

So if a man having land on the part of his mother make a feoffment in fee to the use of himself and his heirs, this use, though expressed, shall not go to him and the heirs on the part of his father as a new purchase, no more than it should have done if it had been a feoffment in fee nakedly without consideration, for

4 M. 134. pl.

the intendment is remote. But if baron and feme be, and they join in a fine of the feme's lands, and express an use to the husband and wife and their heirs: this limitation shall give a joint estate by entierties to them both, because the intendment of law would have conveyed the use to the feme alone. And thus much touching foreign intendments. 14 H. 8. 5. per Browne. 5 Ed. 4. 8. 19 H. 8. 11.

For matter *ex post facto*, if a lease for life be made to two, and the survivor of them, and they after make partition: now these words [and to the survivor of them] should seem to carry purpose as a limitation, that either of them should be stated in his part for both their lives severally; but yet the law at the first construeth the words but words of dilating to describe a joint estate; but if one of them die after partition, there shall be no occupant, but his part shall revert. 30 Ass. 8. Fitz. part 16. 1 H. 8. 46. Pl. 7. Dy.

So if a man grant a rent charge out of ten acres, and grant farther that the whole rent shall issue out of every acre, and distress accordingly, and afterwards the grantee purchase an acre: now this clause shall seem to be material to uphold the whole rent; but yet nevertheless the law at first accepteth of these words but as words of explanation, and then notwithstanding the whole rent is extinct.

So if a gift in tail be made upon condition, that if tenant in tail die without issue, it shall be lawful for the donor to enter; and the donee discontinue and die without issue: now this condition should seem material to give him benefit of entry, but because it did at the first limit the estate according to the limitation in law, it worketh nothing upon this matter emergent afterward. 4 Ed. 6. Com. 33. 27 H. 8. 6.

So if a gift in tail be made of lands held in knight's service with an express reservation of the same service, whereby the land is held over, and the gift is with warranty, and the land is evicted, and other land recovered in value against the donor, held in socage, now the tenure which the law makes between the donor and donee shall be in socage, not in knight's service, because the first reservation was according to the novelty of service, which was no more than the law would have reserved. 22 Ass. Pl. 52.

But if a gift in tail had been made of lands held in socage with a reservation of knight's service tenure, and with warranty, then, because the intendment of law is altered, the new land shall be held by the same service the lost land was, without any regard at all to the tenure paramount: and thus much of matter *ex post facto.*

This rule faileth where as the law saith as much as the party, but upon foreign matter not pregnant and appearing upon the same act or conveyance, as if lessee for life be, and he lets for twenty years, if he live so long; this limitation [if he live so long] is no more than the law saith, but it doth not appear upon the same conveyance or act, that this limitation is nugatory, but it is foreign matter in respect of the truth of the state whence the lease is derived: and therefore if lessee for life make a feoffment in fee, yet the state of the lessee for years is not enlarged against the feoffee; otherwise had it been if such limitation had not been, but that it had been left only to the law.

16 H. 7. 4. per Keble. 24 Ed. 3. 28. Fitz. pl. 98.

So if tenant after possibility make a lease for years, and the donor confirms to the lessee to hold without impeachment of waste during the life of tenant in tail, this is no more than the law saith; but the privilege of tenant after possibility is foreign matter, as to the lease and confirmation: and therefore if tenant after possibility do surrender, yet the lessee shall hold dispunishable of waste; otherwise had it been if no such confirmation had been made.

Also heed must be given that it be indeed the same thing which the law intendeth, and which the party expresseth, and not only like or resembling, and such as may stand both together: for if I let land for life rendring rent, and by my deed warrant the same land, this warranty in law and warranty in deed are not the same thing, but may both stand together.

20 Ed. 3. Fitz. 7. 31 E. 1. Vouch. 289.

There remaineth yet a great question upon this rule.

A principal reason whereupon this rule is built, should seem to be, because such acts or clauses are thought to be but declaratory, and added upon igno-

rance of the law, and *ex consuetudine clericorum*, upon observing of a common form, and not upon purpose or meaning, and therefore whether by particular and precise words a man may not control the intendment of the law.

To this I answer, that no precise nor express words will control this intendment of law; but as the general words are void, because they say that which the law saith; and so are thought to be against the law: and therefore if I devise my land being knight's service tenure to my heir, and express my intention to be, that the one part should descend to him as the third part appointed by the statute, and the other he shall take by devise to his own use; yet this is void: for the law saith, he is in by descent of the whole, and I say he shall be in by devise, which is against the law.

But if I make a gift in tail, and say upon condition, that if tenant in tail discontinue and after die without issue, it shall be lawful for me to enter; this is a good clause to make a condition, because it is but in one case, and doth not cross the law generally: for if the tenant in tail in that case be disseised, and a descent cast, and die without issue, I that am the donor shall not enter.

But if the clause had been provided, that if tenant in tail discontinue, or suffer a descent, or do any other act whatsoever, that after his death without issue it shall be lawful for me to enter: now this is a void condition, for it importeth a repugnancy to law; as if I would over-rule that where the law saith I am put to my action, I nevertheless will reserve to myself an entry.

REGULA XXII.

Non videtur consensum retinuisse si quis ex præscripto minantis aliquid immutavit.

ALTHOUGH choice and election be a badge of consent, yet if the first ground of the act be duress, the law will not construe that the duress doth determine, if the party duressed do make any motion or offer.

Therefore if a party menace me, except I make unto him a bond of 40*l.* and I tell him that I will not do it, but I will make unto him a bond of 20*l.* the law shall not expound this bond to be voluntary, but shall rather make construction that my mind and courage is not to enter into the greater bond for any menace, and yet that I enter by compulsion notwithstanding into the lesser.

But if I will draw any consideration to myself, as if I had said, I will enter into your bond of 40*l.* if you will deliver me that piece of plate, now the duress is discharged; and yet if it had been moved from the duressor, who had said at the first, You shall take this piece of plate, and make me a bond of 40*l.* now the gift of the plate had been good, and yet the bond shall be avoided by duress.

REGULA XXIII.

Licita bene miscentur, formula nisi juris obstet.

THE law giveth that favour to lawful acts, that although they be executed by several authorities, yet the whole act is good.

As when tenant for life is the remainder in fee, and they join in a livery by deed or without, this is one good intire livery drawn from them both, and doth not inure to a surrender of the particular estate, if it be without deed*; or confirmation of those in the remainder, if it be by deed; but they are all parties to the livery.

So if tenant for life the remainder in fee be, and they join in granting a rent, this is one solid rent out of both their estates, and no double rent, or rent by confirmation.

* Semble clerement le ley d'estre contrary in ambideux cases, car lou est sans fait, est livery solement de cestui in le rem' et surr' de partic' ten', autrement sera forfeiture de son estate, et lou est per fait, le livery passa solement de tenant, car il ad le frank-tenement, vide accordant Sur Co. l. 1. 79. b. 77. a Com. Plow. 59. a. 140. 2 H. 5. 7. 13 H. 7. 14. 13 Ed. 4. 4. a. 27 H. 8. 13. M. 16 et 17. El. Dy. 339.

So if tenant in tail be at this day, and he make a lease for three lives, and his own, this is a good lease, and warranted by the statute of 32 H. VIII. and yet it is good in part by the authority which tenant in tail hath by the common law, that is, for his own life, and in part by the authority which he hath by the statute, that is, for the other three lives. Query.

So if a man, seized of lands deviseable by custom and of other land held in knight's service, devise all his lands, this is a good devise of all the land customary by the common law, and of two parts of the other land by the statutes.

So in the Star-chamber a sentence may be good, grounded in part upon the authority given the court by the statute of 3 H. VII. and in part upon that ancient authority which the court hath by the common law, and so upon several commissions.

But if there be any form which the law appointeth to be observed, which cannot agree with the diversities of authorities, then this rule faileth.

And if three coparceners be, and one of them alien her purparty, the feoffee and one of the sisters cannot join in a writ *de part' facienda*, because it behoveth the feoffee to mention the statute in his writ. Vide 1 Institut. 166.b

REGULA XXIV.

Præsentia corporis tollit errorem nominis, et veritas nominis tollit errorem demonstrationis.

THERE be three degrees of certainty.

1. Presence.
2. Name.
3. Demonstration or reference.

Whereof the presence the law holdeth of greatest dignity, the name in the second degree, and the demonstration or reference in the lowest, and always the error or falsity in the less worthy.

And therefore if I give a horse to I. D. being present, and say unto him, I. S. take this; this is a good gift, notwithstanding I call him by a wrong name: but so had it not been if I had delivered him to a stranger to the use of I. S. where I meant I. D.

So if I say unto I. S. Here I give you my ring with the ruby, and deliver it with my hand, and the ring bear a diamond and no ruby, this is a good gift notwithstanding I name it amiss.

So had it been if by word or writing, without the delivery of the thing itself, I had given the ring with the ruby, although I had no such, but only one with a diamond which I meant, yet it would have passed.

So if I by deed grant unto you, by general words, all the lands that the King hath passed unto me by letters patents dated 10 May, unto this present indenture annexed, and the patent annexed have date 10 July, yet if it be proved that that was the true patent annexed, the presence of the patent maketh the error of the date recited not material; yet if no patent had been annexed, and there had been also no other certainty given, but the reference of the patent, the date whereof was mis-recited, although I had no other patent ever of the King, yet nothing would have passed.

Like law is it, but more doubtful, where there is not a presence, but a kind of representation, which is less worthy than a presence, and yet more worthy than a name or reference.

As if I covenant with my ward, that I will tender unto him no other marriage, than the gentlewoman whose picture I delivered him, and that picture hath about it *ætatis suæ anno* 16, and the gentlewoman is seventeen years old; yet nevertheless if it can be proved that the picture was made for that gentlewoman, I may, notwithstanding this mistaking, tender her well enough.

So if I grant you for life a way over my land, according to a plot intended between us, and after I grant unto you and your heirs a way according to the first plot intended, whereof a table is annexed to these presents, and there be some special variance between the table and the original plot, yet this representation shall be certainly sufficient to lead unto the first plot; and you shall have the way in fee nevertheless, according to the first plot, and not according to the table.

So if I grant unto you by general words the land

which the king hath granted me by his letters patents, *quarum tenor sequitur in hæc verba, etc.* and there be some mistaking in the recital and variance from the original patent, although it be in a point material, yet the representation of this whole patent shall be as the annexing of the true patent, and the grant shall not be void by this variance.

Now for the second part of this rule, touching the name and the reference, for the explaining thereof, it must be noted what things sound in demonstration or addition: as first in lands, the greatest certainty is, where the land hath a name proper, as "the manor of "Dale, Grandfield," *etc.* the next is equal to that, when the land is set forth by bounds and abuttals, as "a close of pasture bounding on the east part upon "Emsden-wood, on the south upon," *etc.* It is also a sufficient name to lay the general boundary, that is, some place of larger precinct, if there be no other land to pass in the same precinct, as "all my lands in Dale, "my tenement in St. Dunstan's parish," *etc.*

A farther sort of denomination is to name lands by the attendancy they have to other lands more notorious, as "parcel of my manor of D. belonging to such "a college lying upon Thames bank."

All these things are notes found in denomination of lands, because they be signs local, and therefore of property to signify and name a place: but those notes that sound only in demonstration and addition, are such as are but transitory and accidental to the nature of the place.

As *modo in tenura et occupatione* of the proprietary, tenure or possession is but a thing transitory in respect of land; *Generatio venit, generatio migrat, terra autem manet in æternum.*

So likewise matter of conveyance, title, or instrument.

As, *quæ perquisivi de I. D. quæ descendebant a I. N. patre meo,* or *in prædicta indentura dimissionis,* or *in prædictis literis patentibus specificat'.*

So likewise, *continent' per æstimationem* 20 *acras,* or if *per æstimationem* be left out, all is one, for it is

understood, and this matter of measure, although it seem local, yet it is indeed but opinion and observation of men.

The distinction being made, the rule is to be examined by it.

Therefore if I grant my close called Dale in the parish of Hurst, in the county of Southampton, and the parish likewise extendeth into the county of Berkshire, and the whole close of Dale lieth in the county of Berkshire; yet because the parcel is especially named, the falsity of the addition hurteth not, and yet this addition is found in name, but, as it was said, it was less worthy than a proper name.

So if I grant *tenementum meum*, or *omnia tenementa mea*, for the universal and indefinite to this purpose are all one, *in parochia Sancti Butolphi extra Aldgate*, where the verity is *extra Bishopsgate, in tenura Guilielmi*, which is true, yet this grant is void, because that which sounds in denomination is false, which is the more worthy; and that which sounds in addition is true, which is the less*; and though *in tenura Guilielmi*, which is true, had been first placed, yet it had been all one.

Vide ib. quæ contraria est lex, car icy auxile primer certainty est faux.

But if I grant *tenementum meum quod perquisivi de R. C. in Dale*, where the truth was *T. C.* and I have no other tenements in D. but one, this grant is good, because that which soundeth in name, namely, *in Dale*, is true, and that which soundeth in addition, namely, *quod perquisivi, etc.* is only false.

So if I grant *prata mea in Dale continentia* 10 *acras*, and they contain indeed twenty acres, the whole twenty pass.

So if I grant all my lands, being parcels *manerii de D. in prædictis literis patentibus specificat'*, and there be no letters patents, yet the grant is good enough.

The like reason holds in demonstrations of persons, that have been declared in demonstration of lands and

* Semble icy le grant ust este assets bon, come fuit resolu per cur', Co. lib. 3, fol. 10. a. vid. 33 H. 8. Dy. 50. b. 12 El. ib. 292. b. et Co. lib. 2. fo. 33. a.

places, the proper name of every one is in certainty worthiest: next are such appellations as are fixed to his person, or at least of continuance, as, son of such a man, wife of such a husband; or addition of office, as, clerk of such a court, *etc.* and the third are actions or accidents, which sound no way in appellation or name, but only in circumstance, which are less worthy, although they may have a proper particular reference to the intention of the grant.

And therefore if an obligation be made to *I. S. filio et hæredi G. S.* where indeed he is a bastard, yet this obligation is good.

So if I grant land *Episcopo nunc Londinensi, qui me erudivit in pueritia*, this is a good grant, although he never instructed me.

But *e converso*, if I grant land to *I. S. filio et hæredi G. S.* and it be true that he is son and heir unto G. S. but his name is Thomas, this is a void grant.

Or if in the former grant it was the Bishop of Canterbury who taught me in my childhood, yet shall it be good, as was said, to the Bishop of London, and not to the bishop of Canterbury.

The same rule holdeth of denomination of times, which are such a day of the month, such a day of the week, such a Saint's day or eve, to day, to morrow; these are names of times.

But the day that I was born, the day that I was married; these are but circumstances and addition of times.

And therefore if I bind myself to do some personal attendance upon you upon Innocents day, being the day of your birth, and you were not born that day, yet shall I attend.

There rest two questions of difficulty yet upon this rule, first, Of such things whereof men take not so much note as that they shall fail of this distinction of name and addition.

As, "my box of ivory lying in my study sealed up "with my seal of arms; my suit of arras with the "story of the nativity and passion:" of such things there can be no name, but all is of description, and of

circumstance, and of these I hold the law to be, that precise truth of all recited circumstances is not required.

But in such things *ex multitudine signorum colligitur identitas vera*, therefore though my box were not sealed, and although the arras had the story of the nativity, and not of the passion, if I had no other box, nor no other suit, the gifts are good; and there is certainty sufficient, for the law doth not expect a precise description of such things as have no certain denomination.

Secondly, Of such things as do admit the distinction of name and addition, but the notes fall out to be of equal dignity all of name or addition.

As, *prata mea juxta communem fossam in D.* whereof the one is true, the other false; or *tenementum meum in tenura Guilielmi, quod perquisivi de R. C. in prædict' indent' specificat'*, whereof one is true, and two are false; or two are true, and one false.

So *ad curiam quam tenebat die Mercurii tertio die Martii*, whereof the one is true, the other false.

In these cases the former rule, *ex multitudine signorum, etc.* holdeth not; neither is the placing of the falsity or verity first or last material, but all must be true, or else the grant is void; always understood, that if you can reconcile all the words, and make no falsity, that is quite out of this rule, which hath place only where there is a direct contrariety or falsity not to be reconciled to this rule.

Vide livers avant dit pur cest auxi.

As if I grant all my land in D. *in tenura I. S.* which I purchased of I. N. specified in a demise to I. D. and I have land in D. whereof in part of them all these circumstances are true, but I have other lands in D. wherein some of them fail, this grant will not pass all my land in D. for there these are references, and no words of falsity or error, but of limitation and restraint.

REGULA XXV.

Ambiguitas verborum latens verificatione suppletur; nam quod ex facto oritur ambiguum verificatione facti tollitur.

THERE be two sorts of ambiguities of words, the one is *ambiguitas patens,* and the other *latens. Patens* is that which appears to be ambiguous upon the deed or instrument: *latens* is that which seemeth certain and without ambiguity, for any thing that appeareth upon the deed or instrument; but there is some collateral matter out of the deed that breedeth the ambiguity.

Ambiguitas patens is never holpen by averment, and the reason is, because the law will not couple and mingle matter of specialty, which is of the higher account, with matter of averment, which is of inferior account in law; for that were to make all deeds hollow, and subject to averments, and so in effect, that to pass without deed, which the law appointeth shall not pass but by deed.

Therefore if a man give land to *I. D. et I. S. et hæredibus,* and do not limit to whether of their heirs, it shall not be supplied by averment to whether of them the intention was the inheritance should be limited.

So if a man give land in tail, though it be by will, the remainder in tail, and add a *proviso* in this manner: Provided that if he, or they, or any of them do any, *etc.* according to the usual clauses of perpetuities, it cannot be averred upon the ambiguities of the reference of this clause, that the intent of the devisor was, that the restraint should go only to him in the remainder, and the heirs of his body; and that the tenant in tail in possession was meant to be at large.

Of these infinite cases might be put, for it holdeth generally that all ambiguity of words by matter within the deed, and not out of the deed, shall be holpen by construction, or in some case by election, but never by averment, but rather shall make the deed void for uncertainty.

But if it be *ambiguitas latens*, then otherwise it is: as if I grant my manor of S. to I. F. and his heirs, here appeareth no ambiguity at all; but if the truth be, that I have the manors both of South S. and North S. this ambiguity is matter in fact; and therefore it shall be holpen by averment, whether of them was that the party intended should pass.

So if I set forth my land by quantity, then it shall be supplied by election, and not averment.

As if I grant ten acres of wood in sale, where I have an hundred acres, whether I say it in my deed or no, that I grant out of my hundred acres, yet here shall be an election in the grantee, which ten he will take.

And the reason is plain, for the presumption of the law is, where the thing is only nominated by quantity, that the parties had indifferent intentions which should be taken, and there being no cause to help the uncertainty by intention, it shall be holpen by election.

But in the former case the difference holdeth, where it is expressed, and where not; for if I recite, Whereas I am seised of the manor of North S. and South S. I lease unto you *unum manerium de S.* there it is clearly an election. So if I recite, Whereas I have two tenements in St. Dunstan's, I lease unto you *unum tenementum*, there it is an election, not averment of intention, except the intent were of an election, which may be specially averred.

Another sort of *ambiguitas latens* is correlative unto these: for this ambiguity spoken of before, is when one name and appellation doth denominate divers things, and the second, when the same thing is called by divers names.

As if I give lands to Christ-Church in Oxford, and the name of the corporation is *Ecclesia Christi in universitate Oxford*, this shall be holpen by averment, because there appears no ambiguity in the words: for this variance is matter in fact, but the averment shall not be of intention, because it doth stand with the words.

For in the case of equivocation the general intent includes both the special, and therefore stands with

the words: but so it is not in variance, and therefore the averment must be of matter, that do endure quantity, and not intention.

As to say, of the precinct of Oxford, and of the University of Oxford, is one and the same, and not to say that the intention of the parties was, that the grant should be to Christ-Church in that University of Oxford.

THE

USE OF THE LAW;

FOR

PRESERVATION

OF OUR

PERSONS, GOODS, AND GOOD NAMES.

ACCORDING TO THE

PRACTICE OF THE LAWS AND CUSTOMS

OF THIS LAND.

The use of the law, and wherein it principally consisteth.

THE use of the law consisteth principally in these three things:

I. To secure mens persons from death and violence.

II. To dispose the property of their goods and lands.

III. For preservation of their good names from shame and infamy.

Surety to keep the peace.

FOR safety of persons, the law provideth that any man standing in fear of another may take his oath before a justice of peace, that he standeth in fear of his life, and the justice shall compel the other to be bound with sureties to keep the peace.

Action for slander, battery, *etc.*

If any man beat, wound, or maim another, or give false scandalous words that may touch his credit, the law giveth thereupon an action of the case for the slander of his good name; and an action of battery, or an appeal of maim, by which recompence shall be recovered, to the value of the hurt, damage or danger.

Appeal of murder given to the next of kin.

If any man kill another with malice, the law giveth an appeal to the wife of the dead, if he had any, or to the next of kin that is heir, in default of a wife; by which appeal the defendant convicted is to suffer death, and to lose all his lands and goods: but if the wife or heir will not sue, or be com-

pounded withal, yet the King is to punish the offence by indictment or presentment of a lawful inquest and trial of the offender before competent judges; whereupon being found guilty, he is to suffer death, and to lose his lands and goods.

If one kill another upon a sudden quarrel, this is man-slaughter, for which the offender must die, except he can read; and if he can read, yet must he lose his goods, but no lands.

Man-slaughter when a forfeiture of goods, and when not.

And if a man kill another in his own defence, he shall not lose his life, nor his lands, but he must lose his goods, except the party slain did first assault him, to kill, rob, or trouble him by the high-way side, or in his own house, and then he shall lose nothing.

And if a man kill himself, all his goods and chattels are forfeited, but no lands.

Felo de se.

If a man kill another by misfortune, as shooting an arrow at a butt or mark, or casting a stone over a house, or the like, this is loss of his goods and chattels, but not of his lands, nor life.

Felony by mischance.

If a horse, or cart, or a beast, or any other thing do kill a man, the horse, beast, or other thing is forfeited to the crown, and is called a *Deodand*, and usually granted and allowed by the King to the bishop almoner, as goods are of those that kill themselves.

Deodand.

The cutting out of a man's tongue, or putting out his eyes maliciously, is felony; for which the offender is to suffer death, and lose his lands and goods.

Cutting out tongues, and putting out eyes, felony.

But for that all punishment is for example's sake, it is good to see the means whereby offenders are drawn to their punishment; and first for matter of the peace.

The ancient laws of England, planted here by the Conqueror, were, that there should be officers of two sorts in all the parts of this realm to preserve the peace:

1. *Constabularii pacis.*

2. Conservatores pacis.

The office of the constable.

The office of the constable was to arrest the parties that he had seen breaking the peace, or in fury ready to break the peace, or was truly informed by others, or by their own confession, that they had freshly broken the peace; which persons he might imprison in the stocks, or in his own house, as his or their quality required, until they had become bounden with sureties to keep the peace; which obligation from thenceforth was to be sealed and delivered to the constable to the use of the King; and that the constable was to send to the King's exchequer or chancery, from whence process should be awarded to levy the debt, if the peace were broken.

But the constables could not arrest any, nor make any put in bond upon complaint of threatning only, except they had seen them breaking the peace, or had come freshly after the peace was broken. Also, these constables should keep watch about the town for the apprehension of rogues and vagabonds, and night-walkers, and eves-droppers, scouts, and such like, and such as go armed. And they ought likewise to raise hue and cry against murderers, manslayers, thieves and rogues.

High-constables for every hundred. Petty constables for every village.

Of this office of constable there were high constables, two of every hundred; petty constables, one in every village: they were in ancient time all appointed by the sheriff of the shire yearly in his court called the Sheriff's Turn, and there they received their oath. But at this day they are appointed either in the law-day of that precinct wherein they serve, or else by the high constable in the sessions of the peace.

The King's bench first instituted, and its jurisdiction.

The Sheriff's Turn is a court very ancient, incident to his office. At the first it was erected by the Conqueror, and called the King's bench, appointing men studied in the knowledge of the laws to execute justice, as substitutes to him, in his name, which men are to be named *Justiciarii ad placita coram rege assignati:* one of them being *capitalis justiciarius,* called to his fellows; the rest in number as

pleaseth the King: of late but three *justiciarii*, holden by patent. In this court every man above twelve years of age was to take his oath of allegiance to the King; if he were bound, then his lord to answer for him. In this court the constables were appointed and sworn; breakers of the peace punished by fine and imprisonment; the parties beaten or hurt recompensed upon complaints of damages; all appeals of murder, maim, robbery, decided; contempts against the crown, public annoyances against the people, treasons and felonies, and all other matters of wrong betwixt party and party for lands and goods.

Court of Marshalsea erected, and its jurisdiction within 12 miles of the chief tunnel, *etc.*

But the King seeing the realm grow daily more and more populous, and that this one court could not dispatch all, did first ordain that his marshal should keep a court, for controversies arising within the verge, which was within twelve miles of the chiefest tunnel of the court; which did but ease the King's bench in matters only concerning debts, covenants, and such like, of those of the King's houshold only; never dealing in breaches of the peace, or concerning the crown by any other persons, or any pleas of lands.

Sheriff's Turn instituted upon the division of England into counties, *etc.* Likewise called *Curia visus franci plegii.*

Insomuch as the King, for farther ease, having divided this kingdom into counties, and committing the charge of every county to a lord or earl, did direct that those earls, within their limits, should look to the matter of the peace, and take charge of the constables, and reform public annoyances, and swear the people to the crown, and take pledges of the freemen for their allegiance; for which purpose the county did once every year keep a court, called the Sheriff's Turn; at which all the county, except women, clergy, children under twelve, and aged above sixty, did appear to give or renew their pledges for allegiance. And the court was called, *Curia visus franci plegii*, a view of the pledges of freemen; or *Turna comitatus.*

Subdivision of the county court into hundreds.

At which meeting or court there fell, by occasion of great assemblies, much blood-shed, scarcity of

victuals, mutinies, and the like mischiefs, which are incident to the congregations of people, by which the King was moved to allow a subdivision of every county into hundreds, and every hundred to have a court, whereunto the people of every hundred should be assembled twice a year for survey of pledges, and use of that justice which was formerly executed in that grand court for the county; and the count or earl appointed a bailiff under him to keep the hundred court.

The charge of the county taken from the earls, and committed to the sheriff.

But in the end, the Kings of this realm found it necessary to have all execution of justice immediately from themselves, by such as were more bound than earls to that service, and readily subject to correction for their negligence or abuse; and therefore took to themselves the appointing a sheriff yearly in every county, calling them *Vicecomites*, and to them directed such writs and precepts for executing justice in the county, as fell out needful to have been dispatched, committing to the sheriff *custodiam comitatus;* by which the earls were spared of their toils and labours, and that was laid upon the sheriffs. So as now the sheriff doth all the King's business in the county, and that is now called the Sheriff's Turn; that is to say, he is judge of this grand court for the county, and also of all hundred courts not given away from the crown.

The sheriff is judge of all hundred courts, *etc.*

County court kept monthly by the sheriff.

He hath another court called the county court, belonging to his office, wherein men may sue monthly for any debt or damages under 40*s.* and may have writs for to replevy their cattle distrained and impounded by others, and there try the cause of their distress; and by a writ called *justicies*, a man may sue for any sum; and in this court the sheriff by a writ called an *exigent* doth proclaim men sued in courts above to render their bodies, or else they be out-lawed.

The office of the sheriff.

This sheriff doth serve the King's writs of process, be they summons, or attachments, to compel men to answer to the law, and all writs of execution of the law, according to judgments of superior courts,

for taking of mens goods, lands, or bodies, as the cause requireth.

The hundred courts were most of them granted to religious men, noblemen, and others of great place. And also many men of good quality have attained by charter, and some by usage within manors of their own, liberty of keeping law-days, and to use their justice appertaining to a law-day.

Hundredcourts to whom at first granted.

Whosoever is lord of the hundred court, is to appoint two high constables of the hundred, and also is to appoint in every village a petty constable, with a tithing-man to attend in his absence, and to be at his commandment when he is present, in all services of his office for his assistance.

Lord of the hundred to appoint two high constables.

There have been, by use and statute law, besides surveying of the pledges of freemen, and giving the oath of allegiance, and making of constables, many additions of powers and authority given to the stewards of leets and law-days, to be put in use in their courts; as for example, they may punish inn-keepers, victuallers, bakers, butchers, poulterers, fishmongers, and tradesmen of all sorts, selling with under-weights or measures, or at excessive prices, or things unwholesome, or ill made, in deceit of the people. They may punish those that do stop, straiten, or annoy the high-ways, or do not, according to the provision enacted, repair or amend them, or divert water-courses, or destroy fry of fish, or use engines or nets to take deer, conies, pheasants, or partridges, or build pigeon-houses; except he be lord of the manor, or parson of the church. They may also take presentment upon oath of the twelve sworn jury before them of all felonies; but they cannot try the malefactors, only they must by indenture deliver over those presentments of felony to the judges, when they come their circuits into that county. All those courts before mentioned are in use, and exercised as law at this day, concerning the sheriff's law-days and leets, and the offices of high constables, petty constables, and tithing-men; howbeit, with some further additions by statute

What matters they inquire of in leets and law-days.

laws, laying charge upon them for taxation for poor, for soldiers, and the like, and dealing without corruption, and the like.

Conservators of the peace by writ for term of life, or at the King's pleasure.

CONSERVATORS of the peace were in ancient times certain which were assigned by the King to see the peace maintained, and they were called to the office by the King's writ, to continue for term of their lives, or at the King's pleasure.

What their office was.

For this service, choice was made of the best men of calling in the country, and but few in the shire. They might bind any man to keep the peace, and to good behaviour, by recognizance to the King with sureties, and they might by warrant send for the party, directing their warrant to the sheriff or constable, as they please, to arrest the party and bring him before them. This they used to do, when complaint was made by any that he stood in fear of another, and so took his oath; or else where the conservator himself did, without oath or complaint, see the disposition of any man inclined to quarrel and breach of the peace, or to misbehave himself in some outrageous manner of force or fraud: there by his own discretion he might send for such a fellow, and make him find sureties of the peace, or of his good behaviour, as he should see cause; or else commit him to the gaol if he refused.

Conservators of the peace by virtue of their office.

The judges of either bench in Westminster, barons of the exchequer, master of the rolls, and justices in eyre and assizes in their circuits, were all, without writ, conservators of the peace in all shires of England, and continue to this day.

Justices of peace ordained in lieu of conservators.

Power of placing delegated to the Chancellor.

But now at this day conservators of the peace are out of use, and in lieu of them there are ordained justices of peace, assigned by the King's commissions in every county, which are moveable at the King's pleasure; but the power of placing and displacing justices of the peace is by use delegated from the King to the Chancellor.

That there should be justices of peace by com-

missions, it was first enacted by a statute made 1 Edw. III. and their authority augmented by many statutes made since in every King's reign.

They are appointed to keep four sessions every year; that is, every quarter one. These sessions are a sitting of the justices to dispatch the affairs of their commissions. They have power to hear and determine, in their sessions, all felonies, breaches of the peace, contempts and trespasses, so far as to fine the offender to the crown, but not to award recompence to the party grieved.

To fine offenders to the crown, but not to recompense the party grieved. Parl. stat. 17 R. 2. cap. 10. et v. Dyer 69. b. Ils ount poier d'inqoier de murder car ceo est felon.

* They are to suppress riots and tumults, to restore possessions forcibly taken away, to examine all felons apprehended and brought before them; to see impotent poor people, or maimed soldiers provided for, according to the laws; and rogues, vagabonds, and beggars punished. They are both to licence and suppress ale-houses, badgers of corn and victuals, and to punish forestallers, regrators, and ingrossers.

* Authority of the justices of peace, *etc.*

Through these, in effect, run all the county services to the crown, as taxations of subsidies, mustering men, arming them, and levying forces, that is done by a special commission or precept from the King. Any of these justices, by oath taken by a man that he standeth in fear that another man will beat him, or kill him, or burn his house, are to send for the party by warrant of attachment directed to the sheriff or constable, and then to bind the party with sureties by recognisance to the King, to keep the peace, and also to appear at the next sessions of the peace; at which next sessions, when every justice of the peace hath therein delivered all their recognisances so taken, then the parties are called, and the cause of binding to the peace examined, and both parties being heard, the whole bench is to determine as they see cause, either to continue the party so bound, or else to discharge him.

Beating, killing, burning of houses.

Attachments for surety of the peace.

Recognisance of the peace delivered by the justices at their sessions.

The justices of peace in their sessions are attended by the constables and bailiffs of all hundreds and liberties within *the county*, and by the sheriff or

Quarter sessions held by the justices of the peace.

his deputy, to be employed as occasion shall serve in executing the precepts and directions of the court. They proceed in this sort: The sheriff doth summon twenty-four freeholders, discreet men of the said county, whereof some sixteen are selected and sworn, and have their charge to serve as the grand jury; the party indicted is to traverse the indictment, or else to confess it, and so submit himself to be fined as the court shall think meet, regard had to the offence, except the punishment be certainly appointed, as often it is, by special statutes.

The authority of justices of the peace out of their sessions.

The justices of peace are many in every county, and to them are brought all traitors, felons, and other malefactors of any sort upon their first apprehension; and that justice to whom they are brought examineth them, and heareth their accusations, but judgeth not upon it; only if he find the suspicion but light, then he taketh bond with sureties of the accused to appear either at the next assizes, if it be a matter of treason or felony; or else at the quarter sessions, if it be concerning riot or misbehaviour, or some other small offence. And he also then bindeth to appear those that give testimony and prosecute the accusation, all the accusers and witnesses, and so setteth the party at large. And at the assizes or sessions, as the case falleth out, he certifieth the recognisances taken of the accused, accusers, and witnesses, who being there are called, and appearing, the cause of the accused is debated according to law for his clearing or condemning.

But if the party accused seem, upon pregnant matter in the accusation, and to the justice, to be guilty, and the offence heinous, or the offender taken with the *mainour*, then the justice is to commit the party by his warrant, called a *mittimus*, to the gaoler of the common gaol of the county, there to remain until the assizes. And then the justice is to certify his accusation, examination, and recognisance taken for the appearances and prosecution of the witnesses, so as the judges may, when they come, readily proceed with him as the law requireth.

The judges of the assizes as they be now came into the place of the ancient justices in eyre, called *justiciarii itinerantes*, which in the prime kings after the conquest, until H. III's time especially, and after in lesser measure even to R. II's time, did execute the justice of the realm; they began in this sort.

Judges of assize in place of the ancient judges in eyre, Tem. R. II.

The King, not able to dispatch business in his own person, erected the court of King's bench. That not able to receive all, nor meet to draw the people all to one place, there were ordained counties, and the sheriffs turns, hundred courts, and particular leets, and law-days, as before mentioned, which dealt only with crown matters for the public; but not the private titles of lands, or goods, nor the trial of grand offences of treasons and felonies. All the counties of the realm were divided into six circuits: and two learned men, well read in the laws of the realm, were assigned by the King's commission to every circuit, and to ride twice a year through those shires allotted to that circuit, making proclamation beforehand, a convenient time, in every county, of the time of their coming, and place of their sitting, to the end the people might attend them in every county of that court.

King's bench, marshal's court, county-court, sheriff's turns, hundreds, leets, and law-days, dealt only in crown matters; justices in eyre dealt in private titles of lands or goods, and in all treasons and felonies, which the county courts meddled not in.

They were to stay three or four days in every county, and in that time all the causes of that county were brought before them by the parties grieved, and all the prisoners of every gaol in the said shire, and whatsoever controversies arising concerning life, lands, or goods.

The authority of these judges in eyre is in part translated by act of parliament to justices of assize, which be now the judges of circuits, and they to use the same course that justices in eyre did, to proclaim their coming every half year, and the place of their sitting.

The authority of judges in eyre, translated to justices of assize.

The business of the justices in eyre, and of the justices of assize at this day, is much lessened, for that in H. III's time there was erected the court

Justices of assize much lessened by the court of com-

mon pleas, erected in H. III's time.

of common-pleas at Westminster, in which court have been ever since, and yet are, begun and handled the great suits of lands, debts, benefices, and contracts, fines for assurance of lands and recoveries, which were wont to be either in the King's bench, or else before the justices in eyre. But the statute of *Mag. Chart. cap.* 11. is negative against it, namely, *Communia placita non sequantur curiam nostram, sed teneantur in aliquo loco certo;* which *locus certus* must be the common-pleas; yet the judges of circuits have now five commissions by which they sit.

Justices of assize sit by five commissions.

Oyer and terminer, in which the judges are of the *Quorum*, etc.

The first is a commission of oyer and terminer, directed unto them, and many others of the best account, in their circuits: but in this commission the judges of assize are of the *Quorum*, so as without them there can be no proceeding.

This commission giveth them power to deal with treasons, murders, and all manner of felonies and misdemeanors whatsoever; and this is the largest commission that they have.

Gaol-delivery directed only to the judges and clerk of assize.

The second is a commission of gaol-delivery, that is only to the judges themselves, and the clerk of the assize associate: and by this commission they are to deal with every prisoner in the gaol, for what offence soever he be there, and to proceed with him according to the laws of the realm, and the quality of his offence; and they cannot by this commission do any thing concerning any man, but those that are prisoners in the gaol. The course now in use of execution of this commission of gaol-delivery, is this. There is no prisoner but is committed by some justice of peace, who before he committed him took his examination, and bound his accusers and witnesses to appear and prosecute at the gaol-delivery. This justice doth certify these examinations and bonds, and thereupon the accuser is called solemnly into the court, and when he appeareth, he is willed to prepare a bill of indictment against the prisoner, and go with it to the grand jury, and give evidence upon their oaths, he and the witnesses;

which he doth: and then the grand jury write thereupon either *billa vera*, and then the prisoner standeth indicted: or else *ignoramus*, and then he is not touched. The grand jury deliver these bills to the judges in their court, and so many as they find indorsed *billa vera*, they send for those prisoners; then is every man's indictment put and read to him, and they ask him, whether he be guilty or not: if he saith, Guilty, his confession is recorded; if he say, Not guilty, then he is asked how he will be tried; he answereth, By the country. Then the sheriff is commanded to return the names of twelve freeholders to the court, which freeholders be sworn to make true delivery between the King and the prisoner; and then the indictment is again read, and the witnesses sworn to speak their knowledge concerning the fact, and the prisoner is heard at large what defence he can make, and then the jury go together and consult. And after a while they come in with a verdict of Guilty or Not guilty, which verdict the judges do record accordingly. If any prisoner plead Not guilty upon the indictment, and yet will not put himself to trial upon the jury, or stand mute, he shall be pressed.

The manner of the proceedings of the justices of circuits.

Of the judges for the gaol-delivery.

The judges, when many prisoners are in the gaol, do in the end before they go peruse every one. Those that were indicted by the grand jury, and found Not guilty by the select jury, they judge to be quitted, and so deliver them out of the gaol. Those that are found Guilty by both juries, they judge to death, and command the sheriff to see execution done. Those that refuse trial by the country, or stand mute upon the indictment, they judge to be pressed to death. Some whose offences are pilfering under twelve pence value, they judge to be whipped. Those that confess their indictments, they judge to death, whipping, or otherwise, as their offence requireth. And those that are not indicted at all, but their bill of indictment returned with *ignoramus* by the grand jury, and all others in the gaol, against whom no bills at all are preferred, they

do acquit by proclamation out of the gaol; that one way or other they rid the gaol of all the prisoners in it. But because some prisoners have their books, and are burned in the hand, and so delivered, it is necessary to show the reason thereof. This having their books is called their clergy, which in ancient time began thus.

Books allowed, clergy, &c.

For the scarcity of the clergy in the realm of England, to be disposed in religious houses, or for priests, deacons, and clerks of parishes, there was a prerogative allowed to the clergy, that if any man that could read as a clerk were to be condemned to death, the bishop of the diocese might, if he would, claim him as a clerk, and he was to see him tried in the face of the court whether he could read or not. The book was prepared and brought by the bishop, and the judge was to turn to some place as he should think meet; and if the prisoner could read, then the bishop was to have him delivered over unto him, to dispose of in some places of the clergy as he should think meet: but if either the bishop would not demand him, or that the prisoner could not read, then was he to be put to death.

Clergy allowed anciently in all offences, except treason and robbing of churches; now taken away, 1. In murder. 2. In burglary. 3. Robbery. 4. Purse-cutting. 5. Horse-stealing, and in divers other offences. By the stat. of 18 E. judges are to allow clergy, and to see them burned in the hand, and to discharge the prisoners without delivering them to the bishop.

And this clergy was allowable, in the ancient times and law, for all offences, whatsoever they were, except treason, and the robbing of churches of their goods and ornaments. But by many statutes made since, the clergy is taken away for murder, burglary, robbery, purse-cutting, horse-stealing, and divers other felonies, particularized by the statutes to the judges; and lastly, by a statute made 18 Elizabeth, the judges themselves are appointed to allow clergy to such as can read, being not such offenders from whom clergy is taken away by any statute, and to see them burned in the hand, and so discharge them, without delivering them to the bishop; howbeit, the bishop appointeth the deputy to attend the judges with a book, to try whether they can read or not.

The third commission that the judges of circuits have, is a commission directed to themselves only,

and the clerk of assize, to take assizes, by which they are called justices of assize; and the office of those justices is to do right upon writs called assizes, brought before them by such as are wrongfully thrust out of their lands. Of which number of writs there was far greater store brought before them in ancient times than now; for that mens seisins and possessions are sooner recovered by sealing leases upon the ground, and by bringing an *ejectione firmæ*, and trying their title so, than by the long suits of assizes.

4. Commission to take *Nisi prius*, directed to two judges, and the clerk of the assize. *Nisi prius.*

The fourth commission is a commission to take *Nisi prius*, directed to none but to the judges themselves, and their clerks of assizes, by which they are called justices of *Nisi prius*. These *Nisi prius* happen in this sort; when a suit is begun for any matter in one of the three courts, the King's bench, common-pleas, or the exchequer here above, and the parties in their pleadings do vary in a point of fact; as for example, if in an action of debt upon obligation the defendant denies the obligation to be his debt; or in any action of trespass grown for taking away goods, the defendant denieth that he took them; or in action of the case for slanderous words, the defendant denieth that he spake them, *etc.* Then the plaintiff is to maintain and prove that the obligation is the defendant's deed, that he either took the goods, or spake the words; upon which denial and affirmation the law saith, that issue is joined betwixt them, which issue of the fact is to be tried by a jury of twelve men of the county, where it is supposed by the plaintiff to be done, and for that purpose the judges of the court do award a writ of *Venire facias* in the King's name to the sheriff of that county, commanding him to cause four and twenty discreet freeholders of his county, at a certain day, to try this issue so joined; out of which four and twenty only twelve are chosen to serve. And that double number is returned, because some may make default, and some be challenged upon kindred, alliance, or partial dealing.

These four and twenty the sheriff doth name and certify to the court, and withal, that he hath warned them to come at the day according to their writ. But because at the first summons there falleth no punishment upon the four and twenty if they come not, they very seldom or never appear upon the first writ; and upon their default there is another writ* returned to the sheriff, commanding him to distrain them by their lands to appear at a certain day appointed by the writ, which is the next term after, *Nisi prius justiciarii nostri ad assisas capiendas venerint, etc.* of which words the writ is called a *Nisi prius*, and the judges of the circuit of that county in that vacation, and mean time, before the day of appearance appointed for the jury above, here by their commission of *Nisi prius*, have authority to take the appearance of the jury in the county before them, and there to hear the witnesses and proofs on both sides, concerning the issue of the fact, and to take the verdict of the jury, and against the day they should have appeared above, to return the verdict read in the court above, which return is called a *Postea*.

**Distringas.* The manner of proceeding of justices of circuits. The course the judges hold in the taking of *Nisi prius.*

Postea.

And upon this verdict, clearing the matter in fact, one way or other, the judges above give judgment for the party for whom the verdict is found, and for such damages and costs as the jury do assess.

By those trials called *Nisi prius*, the juries and the parties are eased much of the charge they should be put to, by coming to London with their evidences and witnesses; and the courts of Westminster are eased of much trouble they should have, if all the juries for trials should appear and try their causes in those courts; for those courts above have little leisure now. Though the juries come not up, yet in matters of great weight, or where the title is intricate or difficult, the judges above, upon information to them, do retain those causes to be tried there, and the juries do at this day, in such cases, come to the bar at Westminster.

The fifth commission that the judges in their circuits do sit by, is the commission of the peace in every county of their circuit. And all the justices of the peace, having no lawful impediment, are bound to be present at the assizes to attend the judges, as occasion shall fall out: if any make default, the judges may set a fine upon him at their pleasure and discretions. Also the sheriff in every shire through the circuit is to attend in person, or by a sufficient deputy allowed by the judges, all that time they be within the county, and the judges may fine him if he fail, or for negligence or misbehaviour in his office before them; and the judges above may also fine the sheriff, for not returning, or not sufficient returning of writs before them.

5. Commission is a commission of the peace. The justices of the peace and the sheriff are to attend the judges in their county.

Property in lands, how gotten or transferred.

I. By entry.
II. By descent.
III. By escheat.
IV. Most usually by conveyance.

I. PROPERTY by entry is, where a man findeth a piece of land that no other possesseth, or hath title unto, and he that so findeth it doth enter, this entry gaineth a property. This law seemeth to be derived from this text, *Terram dedit filiis hominum*, which is to be understood, to those that will till and manure it, and so make it yield fruit: and that is he that entereth into it, where no man had it before. But this manner of gaining lands was in the first days, and is not now of use in England, for that by the conquest all the land of this nation was in the Conqueror's hands, and appropriated unto him; except religious and church lands, and the lands in Kent, which by composition were left to the former owners, as the Conqueror found them; so that none but the bishopricks, churches, and the men of Kent, can at this day make any greater title than from the conquest, to any lands in England. And lands pos-

Of the property of lands to be gained by entry.

All lands in England were the Conqueror's, and held of him, except, 1. Religious and church-lands. 2. The lands of the men of Kent.

sessed without any such title, are in the crown, and not in him that first entereth; as it is in land left by the sea; this land belongeth to the King, and not to him that hath the lands next adjoining, which was the ancient sea banks. This is to be understood of the inheritance of lands, namely, that the inheritance cannot be gained by the first entry. But an estate for another man's life by occupancy, may at this day be gotten by entry. As a man called A. having land conveyed unto him for the life of B. dieth without making any estate of it, there, whosoever first entereth into the land after the decease of A. getteth the property in the land for time of the continuance of the estate which was granted to A. for the life of B. which B. yet liveth, and therefore the said land cannot revert till B. die. And to the heir of A. it cannot go, for that it is not any estate of inheritance, but only an estate for another man's life; which is not descendable to the heir, except he be specially named in the grant, namely, to him and his heirs. As for the executors of A. they cannot have it, for it is not an estate testamentary, that it should go to the executors as goods and chattels should, so as in truth no man can intitle himself unto those lands; and therefore the law preferreth him that first entreth, and he is called *occupans*, and shall hold it during the life of B. but must pay the rent, perform the conditions, and do no waste: and he may by deed assign it to whom he please in his life-time. But if he die before he assign it over, then it shall go again to whomsoever first entreth and holdeth; and so all the life of B. so often as it shall happen.

Lands left by the sea belongeth to the King.

Occupancy.

Likewise, if any man doth wrongfully enter into another man's possession, and put the right owner of the freehold and inheritance from it, he thereby getteth the freehold and inheritance by disseisin, and may hold it against all men, but him that hath right, and his heirs, and is called a disseisor. Or if any one die seised of lands, and before his heir doth enter, one that hath no right doth enter into the

lands, and holdeth them from the right heir, he is called an abator, and is lawful owner against all men but the right heir.

And if such person, abator or disseissor, so as the disseissor hath quiet possession five years next after the disseisin, do continue their possession, and die seised, and the land descend to his heir, they have gained the right to the possession of the land against him that hath right, till he recover it by fit action real at the common law. And if it be not sued for at the common law, within threescore years after the disseisin, or abatement committed, the right owner hath lost his right by that negligence. And if a man hath divers children, and the elder, being a bastard, doth enter into the land, and enjoyeth it quietly during his life, and dieth thereof so seised, his heirs shall hold the land against all the lawful children, and their issues.

II. PROPERTY of lands by descent is, where a man hath lands of inheritance and dieth, not disposing of them, but leaving it to go, as the law casteth it, upon the heir. This is called a descent in law, and upon whom the descent is to light, is the question. For which purpose, the law of inheritance preferreth the first child before all others, and amongst children the male before the female; and amongst males the first born. If there be no children, then the brother; if no brother, then sisters; if neither brothers nor sisters, then uncles, and for lack of uncles, aunts; if none of them, then cousins in the nearest degree of consanguinity, with these three rules of diversities. 1. That the eldest male shall solely inherit; but if it come to females, then they being all in an equal degree of nearness shall inherit all together, and are called parceners, and all they make but one heir to the ancestor. 2. That no brother or sister of the half blood shall inherit to his brother or sister, but as a child to his parents: as for example, if a man have two wives, and by either wife a son, the eldest son over-living his father, is

Property of lands by descent.

Of descent: three rules.

Brother or sister of the half blood shall not inherit to his brother or sister, but only as a child to his parents.

to be preferred to the inheritance of the father, being fee-simple; but if he entreth and dieth without a child, the brother shall not be his heir, because he is of the half blood to him, but the uncle of the eldest brother or sister of the whole blood: yet if the eldest brother had died, or had not entered in the life of the father, either by such entry or conveyance, then the youngest brother should inherit the land that the father had, although it were a child by the second wife, before any daughter by the first.

Descent.

The third rule about descents: The land purchased so by the party himself that dieth, is to be inherited; first, by the heirs of the father's side; then if he have none of that part, by the heirs of the mother's side. But lands descended to him from his father or mother, are to go to that side only from which they came, and not to the other side.

Those rules of descent mentioned before are to be understood of fee-simples, and not of entailed lands; and those rules are restrained by some particular customs of some particular places: as namely, the customs of Kent, that every male of equal degree of childhood, brotherhood,[n] or kindred, shall inherit equally, as daughters shall, being parceners; and in many borough towns of England, the custom alloweth the youngest son to inherit, and so the youngest daughter. The custom of Kent, is called Gavelkind. The custom of boroughs, Burgh-English.

Customs of certain places.

And there is another note to be observed in fee-simple inheritance, and that is, that every heir having fee-simple land or inheritance, be it by common law or by custom, of either Gavelkind or Burgh-English, is chargeable, so far forth as the value thereof extendeth, with the binding acts of the ancestors from whom the inheritance descendeth; and these acts are collateral incumbrances, and the reason of this charge is, *Qui sentit commodum, sentire debet et incommodum sive onus.* As for example, if a man bind himself and his heirs in an obligation, or do covenant by writing for him and his heirs, or do grant an annuity for him and his heirs, or do make a

Every heir having land is bound by the binding acts of his ancestors, if he be named.

warranty of land, binding him and his heirs to warranty: in all these cases the law chargeth the heir after the death of the ancestor with this obligation, covenant, annuity, and warranty; yet with these three cautions: first, that the party must by special name bind himself and his heirs, or covenant, grant, and warrant for himself and his heirs; otherwise the heir is not to be touched. Secondly, that some action must be brought against the heir, whilst the land or other inheritance resteth in him unaliened away: for if the ancestor die, and the heir, before an action be brought against him upon those bonds, covenants, or warranties, do alien away the land, then the heir is clean discharged of the burden; except the land was by fraud conveyed away of purpose to prevent the suit intended against him. Thirdly, that no heir is farther to be charged than the value of the land descended unto him from the same ancestor that made the instrument of charge, and that land also, not to be sold out-right for the debt, but to be kept in extent, and at a yearly value, until the debt or damage be run out. Nevertheless, if an heir that is sued upon such a debt of his ancestor do not deal clearly with the court when he is sued, that is, if he come not in immediately, and by way of confession set down the true quantity of his inheritance descended, and so submit himself therefore, as the law requireth, then that heir that otherwise demeaneth himself, shall be charged of his own lands or goods, and of his money, for this deed of his ancestor. As for example; if a man bind himself and his heirs in an obligation of one hundred pounds, and dieth leaving but ten acres of land to his heir, if his heir be sued upon the bond, and cometh in, and denieth that he hath any lands by descent, and it is found against him by the verdict that he hath ten acres; this heir shall be now charged by his false plea of his own lands, goods, and body, to pay the hundred pound, although the ten acres be not worth ten pound.

Dyer, 114. Plowd.

Dyer, 149. Plowd.

Day and Pepp's case.

Heir charged for his false plea.

Property of lands by escheat. Two causes of escheat. 1. Bastardy. 2. Attainder of treason, felony.

III. PROPERTY of lands by escheat, is where the owner died seised of the lands in possession without child or other heir, thereby the land, for lack of other heir, is said to escheat to the lord of whom it is holden. This lack of heir happeneth principally in two cases: First, where the land's owner is a bastard. Secondly, where he is attainted of felony or treason. For neither can a bastard have any heir, except it be his own child, nor a man attainted of treason, although it be his own child.

Attainder of treason intitleth the King, though lands be not holden of him: otherwise in attainder of felony, *etc.* for there the King shall have but *annum, diem et vastum.*

Upon attainder of treason the King is to have the land, although he be not the lord of whom it is held, because it is a royal escheat. But for felony it is not so, for there the King is not to have the escheat, except the land be holden of him: and yet where the land is not holden of him, the King is to have the land for a year and a day next ensuing the judgment of the attainder, with a liberty to commit all manner of waste all that year in houses, gardens, ponds, lands, and woods.

In escheats, 1. The tenure. 2. The manner of the attainder.

In these escheats two things are especially to be observed; the one is, the tenure of the lands, because it directeth the person to whom the escheat belongeth, namely, the lord of the manor of whom the land is holden. 2. The manner of such attainder which draweth with it the escheat. Concerning the tenure of lands, it is to be understood, that all lands are holden of the crown either mediately or immediately, and that the escheat appertaineth to the immediate lord, and not to the mediate. The reason why all land is holden of the crown immediately, or by mesne lords, is this:

* The Conqueror got all the lands of the realm into his hands, and reserved rents and services. Knight's service *in capite* first instituted.

The * Conqueror got by right of conquest all the land of the realm into his own hands in demesne, taking from every man all estate, tenure, property, and liberty of the same, except religious and church lands, and the land in Kent; and still as he gave any of it out of his own hand, he reserved some retribution of rents, or services, or both, to him and to his heirs; which reservation is that which is called the tenure of land.

In which reservation he had four institutions, exceeding politic and suitable to the state of a conqueror.

The reservation in knight's service.

First, Seeing his people to be part Normans, and part Saxons, the Normans he brought with him, the Saxons he found here; he bent himself to conjoin them by marriages in amity, and for that purpose ordained, that if those of his nobles, knights, and gentlemen, to whom he gave great rewards of lands, should die, leaving their heir within age, a male within twenty-one, and a female within fourteen years, and unmarried, then the King should have the bestowing of such heirs in marriage in such a family, and to such persons as he should think meet; which interest of marriage went still implied, and doth at this day in every tenure called knight's service.

1. Marriage of the wards. 2. Horse for service. 3. Homage and fealty. 4. Primer seisin.

The policy of the Conqueror in the reservation of services.

The second was, to the end that his people should still be conserved in warlike exercises, and able for his defence. When therefore he gave any good portion of lands, that might make the party of abilities or strength, he withal reserved this service, that that party and his heirs having such lands, should keep a horse of service continually, and serve upon him himself when the king went to wars; or else, having impediment to excuse his own person, should find another to serve in his place: which service of horse and man is a part of that tenure called knight's service at this day.

Reservation that his tenant should keep a horse of service, and serve upon him himself when the King went to war.

But if the tenant himself be an infant, the king is to hold this land himself until he come to full age, finding him meat, drink, apparel, and other necessaries, and finding a horse and a man with the overplus, to serve in the wars, as the tenant himself should do if he were at full age.

But if this inheritance descend upon a woman that cannot serve by her sex, then the King is not to have the lands, she being of fourteen years of age, because she is then able to have a husband that may do the service in person.

3. Institution of the Conqueror was, that his tenants by knight's service vow, 1. Homage. 2. Fealty.

* The third institution was, that upon every gift of land the King reserved a vow and an oath to bind the party to his faith and loyalty: that vow was called homage, the oath fealty. Homage is to be done kneeling, holding his hands between the knees of the lord, saying in the French tongue, I become your man of life and limb, and of earthly honour. Fealty is to take an oath upon a book, that he will be a faithful tenant to the King, and do his service, and pay his rents according to his tenure.

4. Institution was for recognition of the King's bounty, every heir to pay one year's profit of the lands called *primer seisin.*

† The fourth institution was, that for recognition of the King's bounty by every heir succeeding his ancestor in those knight's service lands, the King should have *primer seisin* of the lands, which is one year's profit of the land; and until this be paid, the King is to have possession of the land, and then to restore it to the heir; which continueth at this day in use, and is the very cause of suing livery, and that as well where the heir hath been in ward, as otherwise.

Knight's service *in capite* is a tenure *de persona regis.* Tenants by grand serjeanty were to pay relief at the full age of every heir, which was one year's value of the lands so held *ultra repriss.*

These before-mentioned be the rights of the tenure, called knight's service *in capite*, which is as much to say, as tenure *de persona regis*; and *caput* being the chiefest part of the person, it is called a tenure *in capite*, or in chief. And it is also to be noted, that as this tenure *in capite* by knight's service generally was a great safety to the crown, so also the Conqueror instituted other tenures *in capite* necessary to his estate; as namely, he gave divers lands to be holden of him by some special service

* Aid money to make the King's eldest son a knight, or to marry his eldest daughter, is likewise due to his Majesty from every one of his tenants in knight's service, that hold by a whole fee 20s. and from every tenant in socage, if his land be worth twenty pound *per annum*, 20s.

† Escuage was likewise due unto the King from his tenant by knight's service: when his Majesty made a voyage royal to war against another nation, those of his tenants that did not attend him there for forty days with horse and furniture fit for service, were to be assessed in a certain sum by act of parliament, to be paid unto his Majesty; which assessment is called escuage.

about his person, or by bearing some special office in his house, or in the field, which have knight's service and more in them, and these be called tenures by grand serjeanty. Also he provided upon the first gift of lands to have revenues by continual service of ploughing his land, repairing his houses, parks, pales, castles, and the like. And sometimes to a yearly provision of gloves, spurs, hawks, horses, hounds, and the like; which kind of reservations are called also tenures in chief, or *in capite* of the King, but they are not by knight's service, because they required no personal service, but such things as the tenant may hire another to do, or provide for his money. And this tenure is called a tenure by socage *in capite*, the word *soca* signifying the plough; howbeit in this latter time, the service of ploughing the land, and of harvest works, is turned into money-rent, for that the Kings do not keep their demesne in their own hands, as they were wont to do; yet what lands were *de antiquo dominio coronæ*, it well appeareth in the records of the exchequer called the book of *Doomsday*. And the tenants in ancient demesne have many immunities and privileges at this day, that in ancient times were granted unto those tenants by the crown; the particulars whereof are too long to set down.

Grand serjeanty. Petty serjeanty.

The institution of socage *in capite*, and that it is now turned into money-rent.

These tenures *in capite*, as well that by *socage*, as the others by knight's service, have this property; that the tenants cannot alien their lands without licence of the King; if they do, the King is to have a fine for the contempt, and may seize the land, and retain it until the fine be paid. And the reason is, because the King would have a liberty in the choice of his tenant, so that no man should presume to enter into those lands, and hold them, for which the King was to have those special services done him, without the King's leave; this licence and fine, as it is now digested, is easy and of course.

There is an office called the office of alienation, where any man may have a licence at a reasonable rate, that is, at the third part of one year's value of

Office of alienation. A licence of alienation is the

third part of one year's value of the land moderately rated.

the land moderately rated. A tenant *in capite* by knight's service or grand serjeanty, was restrained by ancient statute, that he should not give nor alien away more of his lands, than that with the rest he might be able to do the service due to the King; and this is now out of use.

Aid, what. Tenants by knight's service *in capite* paid it to make the King's eldest son a knight, or to marry his eldest daughter.

And to this tenure by knight's service in chief was incident, that the King should have a certain sum of money called *aid*, due, to be ratably levied amongst all those tenants proportionably to their lands, to make his eldest son a knight, or to marry his eldest daughter.

Tenants by socage *in capite*.

And it is to be noted, that all those that hold lands by the tenure of socage *in capite*, although not by knight's service, cannot alien without licence, and they are to sue livery, and pay *primer seisin*, but not to be in ward for body or land.

How manors were at first created. Manors created by great men in imitation of the King in the institutions of tenures. *A manere*, the word manor. Knight's service tenure reserved to common persons.

By example and resemblance of the King's policy in these institutions of tenures, the great men and gentlemen of this realm did the like so near as they could; as for example, when the King had given to any of them two thousand acres of land, this party purposing in this place to make a dwelling, or, as the old word is, his mansion-house, or his manor-house, did devise how he might make his land a complete habitation to supply him with all manner of necessaries; and for that purpose, he would give of the uttermost parts of those two thousand acres, 100 or 200 acres, or more or less, as he should think meet, to one of his most trusty servants, with some reservation of rent, to find a horse for the wars, and go with him when he went with the King to the wars, adding vow of homage, and the oath of *fealty, wardship, marriage, and relief. This relief is to pay five pound for every knight's fee, or after that rate for more or less at the entrance of every heir; which tenant so created, and placed, was and is to this day called a tenant by knight's service, and not by

Relief is 5l. to be paid by every tenant by Knight's service to his lord, *etc.*

* Knight's service tenure created by the lord, is not a tenure by knight's service of the person of the lord, but of his manor.

his own person, but of his manors; of these he might make as many as he would. Then this lord would provide that the land which he was to keep for his own use should be ploughed, and his harvest brought home, his house repaired, his park paled, and the like: and for that end he would give some lesser parcels to sundry others, of twenty, thirty, forty, or fifty acres: reserving the service of ploughing a certain quantity, or so many days of his land, and certain harvest works or days in the harvest to labour, or to repair the house, park-pale, or otherwise, or to give him for his provision, capons, hens, pepper, cummin, roses, gilliflowers, spurs, gloves, or the like: or to pay to him a certain rent, and to be sworn to be his faithful tenant, which tenure was called a socage tenure, and is so to this day; howbeit most of the ploughing and harvest service are turned into money rents.

Socage tenure reserved by the lord.

* The tenants in socage at the death of every tenant were to pay relief, which was not as knight's service is, five pound a knight's fee: but it was, and so is still, one year's rent of the land; and no wardship or other profit to the lord. The remainder of the two thousand acres he kept to himself, which he used to manure by his bondmen, and appointed them at the courts of his manor how they should hold it, making an entry of it into the roll of the remembrances of the acts of his court, yet still in the lord's power to take it away; and therefore they were called tenants at will, by copy of court-roll; being in truth bondmen at the beginning: but having obtained freedom of their persons, and gained a custom by use of occupying their lands, they now are called copy-holders, and are so privileged that the lord cannot put them out, and all through custom. Some copyholders are for lives, one, two, or three successively; and some inheritances from heir to heir by custom; and custom ruleth these estates

Relief of tenant in socage, one year's rent and no wardship, or other profit upon the dying of the tenant.

Villenage or tenure by copy of court-roll.

* All money and escuage money is likewise due unto the lords of their tenants.

wholly, both for widows estates, fines, herriots, forfeitures, and all other things.

Court baron, with the use of it.

Manors being in this sort made at the first, reason was that the lord of the manor should hold a court, which is no more than to assemble his tenants together at a time by him to be appointed; in which court he was to be informed by oath of his tenants, of all such duties, rents, reliefs, wardships, copyholds, or the like, that had happened unto him; which information is called a presentment, and then his bailiff was to seise and distrain for those duties if they were denied or withholden, which is called a court baron: and herein a man may sue for any debt or trespass under forty shillings value, and the freeholders are to judge of the cause upon proof produced upon both sides. And therefore the freeholders of these manors, as incident to their tenures, do hold by suit of court, which is to come to the court, and there to judge between party and party in those petty actions; and also to inform the lord of duties, rents, and services unpaid to him from his tenants. By this course it is discerned who be the lords of lands, such as if the tenants die without heir, or be attainted of felony or treason, shall have the land by escheat.

Suit to the court of the lord incident to the tenure of the freeholders.

What attainders shall give the escheat to the Lord. Attainders, 1. By judgment. 2. By verdict or confession. 3. By outlawry, give the lands to the lord.

Now concerning what attainders shall give the escheat to the lord; it is to be noted, that it must either be by judgment of death given in some court of record against the felon found guilty by verdict, or confession of the felony, or it must be by outlawry of him.

Of an attainder by outlawry.

The outlawry groweth in this sort; a man is indicted for felony, being not in hold, so as he cannot be brought in person to appear and to be tried, insomuch that process of *capias* is therefore awarded to the sheriff, who not finding him, returneth, *non est inventus in balliva mea;* and thereupon another *capias* is awarded to the sheriff; who likewise not finding him maketh the same return: then a writ called an *exigent* is directed to the sheriff, commanding him to proclaim

him in his county-court five several court days, to yield his body; which if the sheriff do, and the party yield not his body, he is said, by the default, to be outlawed, the coroners there adjudging him outlawed, and the sheriff making the return of the proclamations, and of the judgment of the coroners upon the backside of the writ. This is an attainder of felony, whereupon the offender doth forfeit his lands by an escheat to the lord of whom they are holden.

Prayer of the clergy.

But note, that a man found guilty of felony by verdict or confession, and praying his clergy, and thereupon reading as a clerk, and so burnt in the hand and discharged, is not attainted; because he by his clergy preventeth the judgment of death, and is called a clerk convict, who loseth not his lands, but all his goods, chattels, leases, and debts.

He that standeth mute forfeiteth no lands, except for treason.

So a man indicted, that will not answer nor put himself upon trial, although he be by this to have judgment of pressing to death, yet he doth forfeit no lands, but goods, chattels, leases, and debts, except his offence be treason, and then he forfeiteth his lands to the crown.

He that killeth himself forfeiteth but his chattels.

So a man that killeth himself shall not lose his lands, but his goods, chattels, leases, and debts. So of those that kill others in their own defence, or by misfortune.

Flying for felony, a forfeiture of goods.

A man that being pursued for felony, and flieth for it, loses his goods for his flying, although he return and is tried, and found not guilty of the fact.

He that yieldeth his body upon the exigent for felony forfeiteth his goods.

So a man indicted of felony, if he yield not his body to the sheriff until after the exigent of proclamation is awarded against him, this man doth forfeit all his goods for his long stay, although he be not found guilty of the felony; but none is attainted to lose his lands, but only such as have judgments of death by trial upon verdict, or their own confession, or that they be by judgment of the coroners outlawed, as before.

Lands entailed escheat to the King for treason.

Besides the escheats of lands to the lords of whom they be holden, for lack of heirs, and by attainder for felony, which only do hold place in fee-simple lands, there are also forfeiture of lands to the crown by attainder of treason; as namely, if one that hath entailed lands commit treason, he forfeiteth the profits of the lands for his life to the crown, but not to the lord.

Stat. 26 H. 8.

Tenant for life committing treason or felony, there shall be no escheat to the lord.

And if a man having an estate for life of himself, or of another, commit treason or felony, the whole estate is forfeited to the crown, but no escheat to the lord.

But a copy-hold, for fee-simple, or for life, is forfeited to the lord, and not to the crown; and if it be entailed, the lord is to have it during the life of the offender only, and then his heir is to have it.

The custom of Kent is, that Gavelkind land is not forfeitable nor escheatable for felony: for they have an old saying: The father to the bough, and the son to the plough.

The wife loseth no dower, notwithstanding the husband be attainted of felony.

If the husband was attainted, the wife was to lose her thirds in cases of felony and treason, but yet she is no offender; but at this day it is holden by statute law, that she loseth them not for the husband's felony. The relation of these forfeits are these:

Attainder in felony or treason by verdict, confession, or outlawry, forfeiteth all they had from the time of the offence committed.

1. That men attainted of felony or treason, by verdict or confession, do forfeit all the lands they had at the time of their offence committed; and the King or the lord, whosoever of them hath the escheat or forfeiture, shall come in and avoid all leases, statutes, or conveyances done by the offender, at any time since the offence done. And so is the law clear also, if a man be attainted for treason by outlawry: but upon attainder of felony by outlawry, it hath been much doubted by the law-books, whether the lord's title by escheat shall relate back to the time of the offence done, or only to the date of teste of the writ of exigent for proclamation, whereupon he is outlawed: howbeit at this day it is ruled, that it shall reach back to the time of the fact; but for goods, chattels, and debts, the

And so it is upon an attainder of outlawry; otherwise it is in the attainder by verdict, confession, and outlawry, as to their relation for the forfeiture of goods and chattels.

King's title shall look no further back than to those goods, the party attainted by verdict or confession had at the time of the verdict and confession given or made, and in outlawries at the time of the exigent, as well in treasons as felonies: wherein it is to be observed, that upon the party's first apprehension, the king's officers are to seize all the goods and chattels, and preserve them together, dispending only so much out of them, as is fit for the sustentation of the person in prison, without any wasting, or disposing of them until conviction; and then the property of them is in the crown, and not before.

The King's officers to seize a felon's goods and chattels.

It is also to be noted, that persons attainted for felony or treason have no capacity in them to take, obtain, or purchase, save only to the use of the king, until the party be pardoned. Yet the party getteth not back his lands or goods without a special patent of restitution, which cannot restore the blood without an act of parliament. So if a man have a son, and then is attainted of felony or treason, and pardoned, and purchaseth lands, and then hath issue another son, and dieth; the son he had before he had his pardon, although he be his eldest son, and the patent have the words of restitution to his lands, shall not inherit, but his second son shall inherit them, and not the first; because the blood is corrupted by the attainder, and cannot be restored by patent alone, but by act of parliament. And if a man have two sons, and the eldest is attainted in the life of his father, and dieth without issue, the father living, the second son shall inherit the father's lands; but if the eldest son have any issue, though he die in the life of his father, then neither the second son, nor the issue of the eldest, shall inherit the father's lands, but the father shall there be accounted to die without heir; and the land shall escheat, whether the eldest son have issue or not, afterwards or before, though he be pardoned after the death of his father.

A person attainted may purchase, but it shall be to the King's use. There can be no restitution in blood without act of parliament; but a pardon enableth a man to purchase, and the heir begotten after shall inherit those lands.

IV. PROPERTY of lands by conveyance is first

Property of land by con-

veyance divided into, distributed into estates for years, for life, in tail, and fee-simple.

1. Estates in fee. 2. In tail. 3. For life. 4. For years.

These estates are created by word, by writing, or by record.

1. For estates of years, which are commonly called leases for years, they are thus made: where the owner of the land agreeth with the other by word of mouth, that the other shall have, hold, and enjoy the land, to take the profits thereof for a time certain of years, months, weeks, or days, agreed between them; and this is called a lease parole; such a lease may be made by writing poll, or indented of demise, grant, and to farm let, and so also by fine of record; but whether any rent be reserved or no, it is not material. Unto these †leases there may be annexed such exceptions, conditions, and covenants, as the parties can agree on. They are called chattels real, and are not inheritable by the heirs, but go to the executors, and administrators, and be saleable for debts in the life of the owner, or in the executors or administrators hands by writs of execution upon statutes, recognisances, judgments of debts or damages. They be also forfeitable to the crown by outlawry, by attainder for treason, felony, or premunire, killing himself, flying for felony, although not guilty of the fact, standing out, or refusing to be tried by the county, by conviction of felony, by verdict without judgment, petty larceny, or going beyond the sea without licence.

† Leases for years, they go to the executors, and not to the heirs.

Leases are to be forfeited by attainder, 1. In treason. 2. Felony. 3. Premunire. 4. By killing himself. 5. For flying. 6. Standing out, *etc.* 7. By conviction. 8. Petty Larceny. 9. Going beyond the sea without licence. Extents upon stat. staple, merchant, or elegit. Wardship of body and lands are chattels, and forfeitable.

These are forfeitable to the crown, in like manner as leases for years; namely, interest gotten in other men's lands by extending for debt upon judgment in any court of record, statute merchant, statute staple, recognisances; which being upon statutes, are called tenants by statute merchant, or staple, the other tenants by *elegit*, and by wardship of body and lands; for all these are called chattels real, and go to the executors and administrators, and not to the heirs; and are saleable and forfeitable as leases for years are.

2. Leases for lives are also called freeholds: they may also be made by word or writing. There must be livery and seisin given at the making of the lease by him, whom we call the lessor; who cometh to the door, backside, or garden, if it be a house, if not, then to some part of the land, and there he expresseth, that he doth grant unto the taker, called the lessee, for term of his life; and in seisin thereof, he delivereth to him a turf, twig, or ring of the door: and if the lease be by writing, then commonly there is a note written on the backside of the lease, with the names of those witnesses who were present at the time of the livery of seisin made. This estate is not saleable by the sheriff for debt, but the land is to be extended for a yearly value, to satisfy the debt. It is not forfeitable by outlawry, except in cases of felony, nor by any of the means before mentioned, of leases for years; saving in an attainder for felony, treason, premunire, and then only to the crown, and not to the lords by escheat.

Lease for life how forfeitable.

Indorsement of livery, *etc.*

Lease for life not to be sold by the sheriff for debt, but extended at a yearly value.

And though a nobleman or other have liberty by charter, to have all felons goods; yet a tenant holding for term of life, being attainted of felony, doth forfeit unto the king, and not to this nobleman.

A man that hath *bona felon.* by charter, shall not have the estate, if lessee for life be attainted.

If a man have an estate in lands for another man's life, and dieth; this land cannot go to his heir, nor to his executors, but to the party that first entreth; and he is called an occupant; as before hath been declared.

Occupant.

A lease for years or for life may be made also by fine of record, or bargain and sale, or covenant, to stand seised upon good considerations of marriage, or blood; the reasons whereof are hereafter expressed.

3. Entails of lands are created by a gift, with livery and seisin to a man, and to the heirs of his body; this word, body, making the entail, may be demonstrated and restrained to the males or females, heirs of their two bodies, or of the body of either of them, or of the body of the grandfather or father.

Of estate tails, and how such an estate may be limited.

By the stat. of West. 1. made in Ed. I's time, estates in tail were so strengthened, that they were not forfeitable by any attainder. The great inconvenience that ensued thereof.

Entails of lands began by a statute made in Ed. I.'s time, by which also they are so much strengthened, as that the tenant in tail could not put away the land from the heir by any act of conveyance or attainder; nor let it, nor incumber it, longer than his own life.

But the inconvenience thereof was great, for by that means the land being so sure tied upon the heir as that his father could not put it from him, it made the son to be disobedient, negligent, and wasteful, often marrying without the father's consent, and to grow insolent in vice, knowing that there could be no check of disinheriting him. It also made the owners of the land less fearful to commit murders, felonies, treasons, and manslaughters; for that they knew none of these acts could hurt the heir of his inheritance. It hindred men that had entailed lands, that they could not make the best of their lands by fine and improvement, for that none, upon so uncertain an estate as for term of his own life, would give him a fine of any value, nor lay any great stock upon the land, that might yield rent improved.

The prejudice the crown received thereby.

Lastly, those entails did defraud the crown, and many subjects of their debts; for that the land was not liable longer than in his own life-time; which caused that the King could not safely commit any office of account to such whose lands were entailed, nor other men trust them with loan of money.

The stat. 4 H. VII. and 32 H. VIII. to bar estates tail by fine.

These inconveniencies were all remedied by acts of parliament; as namely, by acts of parliament later than the act of entails, made 4 H. VII. 32 H. VIII. a tenant in tail may disinherit his son by a fine with proclamation, and may by that means also make it subject to his debts and sales.

26 H. VIII. 32 H. VIII.

By a statute made 26 H. VIII. a tenant in tail doth forfeit his lands for treason; and by another act of parliament, 32 H. VIII. he may make leases good against his heir for one and twenty years, or three lives; so that it be not of his chief houses,

lands, or demesne, or any lease in reversion, nor less rent reserved than the tenants have paid most part of one and twenty years before, nor have any manner of discharge for doing wastes and spoils: by a statute made 33 H. VIII. tenants of entailed lands are liable to the King's debts by extent; and by statutes made 13 and 39 Eliz. they are saleable for the arrearages upon his account for his office; so that now it resteth, that entailed lands have two privileges only, which be these: First, not to be forfeited for felonies. Secondly, not to be extended for debts after the party's death, except the entails be cut off by fine and recovery.

33 H. VIII. 13 et 39 Eliz. Entails two privileges; 1. Not forfeitable for felony. 2. Not extendable for the debts of the party after his death: proviso, not to exclude his next heir. If he do, to forfeit his estate, and the next heir must enter.

But it is to be noted, that since these notable statutes, and remedies provided by statutes, to dock entails, there is started up a devise called perpetuity, which is an entail with an addition of a proviso conditional, tied to his estate, not to put away the land from his next heir; and if he do, to forfeit his own estate. Which perpetuities, if they should stand, would bring in all the former inconveniencies subject to entails, that were cut off by the former mentioned statutes, and far greater; for by the perpetuity, if he that is in possession start away never so little, as in making a lease, or selling a little quillet, forgetting after two or three descents, as often they do, how they are tied; the next heir must enter, who peradventure is his son, his brother, uncle, or kinsman: and this raiseth unkind suits, setting all the kindred at jars, some taking one part, some another, and the principal parties wasting their time and money in suits of law; so that in the end they are both constrained by necessity to join in a sale of the land, or a great part of it, to pay their debts, occasioned through their suits. And if the chief of the family, for any good purpose of well seating himself, by selling that which lieth far off, to buy that which is near, or for the advancement of his daughters or younger sons, should have reasonable cause to sell, this perpetuity, if it should hold good, restraineth him. And more than

Of a perpetuity, which is an entail with an addition. These perpetuities would bring in all the former inconveniencies of estates tail.

The inconveniencies of those perpetuities.

that, where many are owners of inheritance of land not entailed, may, during the minority of his eldest son, appoint the profits to go to the advancement of the younger sons and daughters, and pay debts; but by entails and perpetuities, the owners of these lands cannot do it, but they must suffer the whole to descend to the eldest son, and so to come to the crown by wardship all the time of his infancy.

Query, Whether it be better to restrain men by these perpetuities from alienations, or to hazard the undoing of houses by unthrifty posterity.

Wherefore, seeing the dangerous times and untowardly heirs, they might prevent those mischiefs of undoing their houses, by conveying the land from such heirs, if they were not tied to the stake by those perpetuities, and restrained from forfeiting to the crown, and disposing it to their own, or to their childrens good; therefore it is worthy of consideration, whether it be better for the subject and sovereign to have the lands secured to mens names and bloods by perpetuities, with all the inconveniencies above-mentioned, or to be in hazard of undoing his house by unthrifty posterity.

The last and greatest estate in land is fee-simple.

4. The last and greatest estate of lands is fee-simple, and beyond this there is none of the former for lives, years, or entails; but beyond them is fee-simple. For it is the greatest, last, and uttermost degree of estates in land; therefore he that maketh a lease for life, or a gift in tail, may appoint a remainder when he maketh another for life or in tail, or to a third in fee-simple; but after a fee-simple he can limit no other estate. And if a man do not dispose of the fee-simple by way of remainder, when he maketh the gift in tail, or for lives, then the fee-simple resteth in himself as a reversion. The difference between a reversion and a remainder is this. The remainder is always a succeeding estate, appointed upon the gifts of a precedent estate at the time when the precedent is appointed. But the reversion is an estate left in the giver, after a particular estate made by him for years, life, or entail. Where the remainder is made with the particular estates, then it must be done by deeds in writing, with livery and seisin, and cannot be by words; and if the

A remainder cannot be limited upon an estate in fee-simple.

The difference between a remainder and a reversion.

A reversion cannot be granted by word.

giver will dispose of the reversion after it remaineth in himself, he is to do it by writing, and not by word, and the tenant is to have notice of it, and to atturn to it, which is to give his assent by word, or paying rent, or the like; and except the tenant will thus atturn, the party to whom the reversion is granted cannot have the reversion, neither can he compel him by any law to atturn, except the grant of the reversion be by fine; and then he may by writ provided for that purpose: and if he do not purchase that writ, yet by the fine the reversion shall pass: and the tenant shall pay no rent, except he will himself, nor be punished for any waste in houses, woods, *etc.* unless it be granted by bargain and sale by indenture enrolled. These fee-simple estates lie open to all perils of forfeitures, extents, incumbrances, and sales.

Atturnment must be had to the grant of the reversion.

The tenant not compellable to atturn, but where the reversion is granted by fine.

Lands are conveyed by these six means:

Lands may be conveyed, 1. By feoffment. 2. By fine. 3. By recovery. 4. By use. 5. By covenant. 6. By will.

1. By feoffment, which is, where by deed lands are given to one and his heirs, and livery and seisin, made according to the form and effect of the deed; if a lesser estate than fee-simple be given, and livery of seisin made, it is not called a feoffment, except the fee-simple be conveyed, but is otherwise called a lease for life or gift in tail, as above-mentioned.

2. A fine is a real agreement, beginning thus, *Hæc est finalis concordia, etc.* This is done before the King's judges in the court of common-pleas, concerning lands that a man should have from another to him and his heirs, or to him for his life, or to him and the heirs males of his body, or for years certain, whereupon rent may be reserved, but no condition or covenants. This fine is a record of great credit; and upon this fine are four proclamations made openly in the common-pleas; that is, in every term one, for four terms together; and if any man having right to the same, make not his claim within five years after the proclamations ended, he loseth his right for ever, except he be an infant, a woman covert, a madman, or beyond the seas, and then his right is saved; so that the claim be within five

What a fine is, and how lands may be conveyed hereby.

Five years non claim barreth not, 1. An infant. 2. Feme covert. 3. Madman. 4. Beyond sea.

years after full age, the death of her husband, recovery of his wits, or return from beyond the seas. This fine is called a feoffment of record, because that it includeth all the feoffment doth, and worketh farther of its own nature, and barreth entails peremptorily, whether the heir doth claim within five years or not, if he claim by him that levied the fine.

Fine is a feoffment of record.

What recoveries are.

3. Recoveries are where for assurances of lands the parties do agree, that one shall begin an action real against the other, as though he had good right to the land, and the other shall not enter into defence against it, but alledge that he bought the land of I. H. who had warranted unto him, and pray that I. H. may be called in to defend the title, which I. H. is one of the criers of the common-pleas, and is called the common-vouchee. This I. H. shall appear and make as if he would defend it, but shall pray a day to be assigned him in his matter of defence; which being granted him, at the day he maketh default, and thereupon the court is to give judgment against him; which cannot be for him to lose his lands, because he hath it not, but the party that he hath sold it to hath that, who vouched him to warrant it.

Common vouchee one of the criers of the court.

Judgment for the demandant against the tenant in tail.

Judgment for tenant to recover so much land in value of the common vouchee.

Therefore the demandant who hath no defence made against it, must have judgment to have the land against him that he sued, who is called the tenant, and the tenant is to have judgment against I. H. to recover in value so much land of his, where in truth he hath none, nor never will. And by this device, grounded upon the strict principles of law, the first tenant loseth the land, and hath nothing for it; but it is by his own agreement for assurance to him that brought it.

A recovery barreth an estate tail and all reversions and remainders thereupon.

This recovery barreth entails, and all remainders and reversions that should take place after the entails, saving where the King is giver of the entail, and keepeth the reversion to himself; then neither the heir, nor the remainder, nor the reversion, is barred by the recovery.

The reason why the heirs, remainders, and reversions are thus barred, is because in strict law the recompence adjudged against the crier that was vouchee, is to go in succession of estate as the land should have done, and then it was not reason to allow the heir the liberty to keep the land itself, and also to have recompence; and therefore he loseth the land, and is to trust to the recompence.

The reason why a common recovery barreth those in remainder and reversions.

This slight was first invented, when entails fell out to be so inconvenient as is before declared, so that men made no conscience to cut them off, if they could find law for it. And now by use, those recoveries are become common assurances against entails, remainders, and reversions, and are the greatest security purchasers have for their money; for a fine will bar the heir in tail, and not the remainder, nor reversion, but a common recovery will bar them all.

The many inconveniencies of estates in tail brought in these recoveries, which are made now common conveyances and assurances for land.

Upon feoffments and recoveries, the estate doth settle as the use and intent of the parties is declared by word or writing, before the act was done: as for example, if they make a writing that one of them shall levy a fine, make a feoffment, or suffer a common recovery to the other: but the use and intent is, that one should have it for his life, and after his decease a stranger to have it in tail, and then a third in fee-simple; in this case the land settleth in an estate according to the use and intent declared: and that by reason of the statute made 27 H. VIII. conveying the land in possession to him that hath interest in the use, or intent of the fine, feoffment, or recovery, according to the use and intent of the parties.

Upon fines, feoffments, and recoveries, the estate doth settle according to the intent of the parties.

Upon this statute is likewise grounded the fourth and fifth of the six conveyances, namely, bargains and sales, and covenants to stand seised to uses; for this statute, wheresoever it findeth an use, conjoineth the possession to it, and turneth it into like quality of estate, condition, rent, and the like, as the use hath.

Bargains, sales, and covenants to stand seised to a use, are all grounded upon one statute.

4. The use is but the equity and honesty to hold the land *in conscientia boni viri.* As for example; I and you agree that I shall give you money for your

What a use is.

land, and you shall make me assurance of it. I pay you the money, but you make me not assurance of it. Here although the estate of the land be still in you, yet the equity and honesty to have it is with me; and this equity is called the use, upon which I had no remedy but in chancery, until this statute was made of 27 H. VIII. and now this statute conjoineth and conveyeth the land to him that hath the use. I for my money paid to you, have the land itself, without any other conveyance from you; and it is called a bargain and sale.

Before 27 H. 8. there was no remedy for a use, but in chancery.

But the parliament that made that statute did foresee, that it would be mischievous that mens lands should so suddenly, upon the payment of a little money, be conveyed from them, peradventure in an alehouse or a tavern upon strainable advantages, did therefore gravely provide another act in the same parliament, that the land upon payment of this money should not pass away, except there were a writing indented, made between the said two parties, and the said writing also within six months inrolled in some of the courts at Westminster, or in the sessions-rolls in the shire where the land lieth; unless it be in cities or corporate towns where they did use to inroll deeds, and there the statute extendeth not.

The stat. of 27 H. 8. doth not pass land upon the payment of money without a deed indented and inrolled.

The stat. of 27 H. 8. extendeth not to places where they did inroll deeds.

5. The fifth conveyance is a covenant to stand seised to uses. It is in this sort: A man that hath a wife and children, brethren and kinsfolks, may by writing under his hand and seal agree, that for their or any of their preferment he will stand seised of his lands to their uses, either for life, in tail, or fee, so as he shall see cause; upon which agreement in writing, there ariseth an equity or honesty, that the land should go according to those agreements; nature and reason allowing these provisions; which equity and honesty is the use. And the use being created in this sort, the statute of 27 H. VIII. before mentioned, conveyeth the estate of the land, as the use is appointed.

A covenant to stand seised to a use.

Upon an agreement in writing to stand seised to the use of any of his kindred, a use may be created, *etc.*

And so this covenant to stand seised to uses, is at this day, since the said statute, a conveyance of land; and with this difference from a bargain and sale, in that this needeth no inrollment, as a bargain and sale doth; nor needeth it to be in writing indented, as bargain and sale must: and if the party to whose use he agreeth to stand seised of the land, be not wife, or child, cousin, or one that he meaneth to marry, then will no use rise, and so no conveyance; for although the law alloweth such weighty considerations of marriage and blood raise uses, yet doth it not admit so trifling considerations, as of acquaintance, schooling, services, or the like.

A covenant to stand seised to a use needeth not inrollment as a bargain and sale to a use doth, *etc.*

But where a man maketh an estate of his land to others, by fine, feoffment, or recovery, he may then appoint the use to whom he listeth, without respect of marriage, kindred, or other things; for in that case his own will and declaration guideth the equity of the estate. It is not so when he maketh no estate, but agreeth to stand seised, nor when he hath taken any thing, as in the cases of bargain and sale, and covenant, to stand seised to uses.

Upon a fine, feoffment, or recovery, a man may limit the use to whom he listeth, without consideration of blood or money. Otherwise, in a bargain and sale, or covenant.

6. The last of the six conveyances is a will in writing; which course of conveyance was first ordained by a statute made 32 H. VIII. before which statute no man might give land by will, except it were in a borough town, where there was an especial custom that men might give their lands by will; as in London, and many other places.

Of the conveyance of land by will.

The not giving of land by will was thought to be a defect at common law, that men in wars, or suddenly falling sick, had no power to dispose of their lands, except they could make a feoffment, or levy a fine, or suffer a recovery; which lack of time would not permit: and for men to do it by these means, when they could not undo it again, was hard; besides, even to the last hour of death, mens minds might alter upon further proofs of their children or kindred, or increase of children or debt, or defect of servants or friends.

The not disposing of lands by will, was thought to be a defect at the common law.

The course that was invented before the stat. of 32 H. 8. first gave power to devise lands by will, was a conveyance of lands to feoffees in trust, to such persons as they should declare in their will.

For which cause, it was reason that the law should permit him to reserve to the last instant the disposing of his lands, and to give him means to dispose of it; which seeing it did not fitly serve, men used this devise:

They conveyed their full estates of their lands, in their good health, to friends in trust, properly called feoffees in trust; and then they would by their wills declare how their friends should dispose of their lands; and if those friends would not perform it, the court of chancery was to compel them by reason of trust; and this trust was called the use of the land, so as the feoffees had the land, and the party himself had the use; which use was in equity, to take the profits for himself, and that the feoffees should make such an estate as he should appoint them; and if he appointed none, then the use should go to the heir, as the estate itself of the land should have done; for the use was to the estate like a shadow following the body.

The inconveniencies of putting land into use.

By this course of putting lands into use there were many inconveniencies, as this use, which grew first for a reasonable cause, namely, to give men power and liberty to dispose of their own, was turned to deceive many of their just and reasonable rights; as namely, a man that had cause to sue for his land, knew not against whom to bring his action, nor who was owner of it. The wife was defrauded of her thirds; the husband of being tenant by courtesy; the lord of his wardship, relief, heriot, and escheat; the creditor of his extent for debt; the poor tenant of his lease; for these rights and duties were given by law from him that was owner of the land, and none other; which was now the feoffee of trust; and so the old owner, which we call the feoffer, should take the profits, and leave the power to dispose of the land at his discretion to the feoffee; and yet he was not such a tenant as to be seised of the land, so as his wife could have dower, or the lands be extended for his debts, or that he could forfeit it for felony or treason, or that his heir could be in

ward for it, or any duty of tenure fall to the lord by his death, or that he could make any leases of it.

Which frauds by degrees of time, as they increased, were remedied by divers statutes: as namely, by a statute of 1 H. VI. and 4 H. VIII. it was appointed that the action may be tried against him which taketh the profits, which was then *cestuy que use;* by a statute made 1 R. III. leases and estates made by *cestuy que use* are made good, and estates by him acknowledged. 4 H. VII. the heir of *cestuy que use* is to be in ward; 16 H. VIII. the lord is to have relief upon the death of any *cestuy que use.*

The frauds of conveyances to use, by degrees of time, as they increased, were remedied by the statutes.

Which frauds nevertheless multiplying daily, in the end, 27 H. VIII. the parliament, purposing to take away all those uses, and reducing the law to the ancient form of conveying of lands by public livery of seisin, fine, and recovery, did ordain, that where lands were put in trust or use, there the possession and estate should be presently carried out of the friends in trust, and settled and invested on him that had the uses, for such term and time as he had the use.

27 H. 8. taking away all uses, reduceth the law to the ancient form of conveyances of land, by feoffment, fine and recovery.

By this statute of 27 H. VIII. the power of disposing land by will is clearly taken away amongst those frauds; whereupon 32 H. VIII. another statute was made, to give men power to give lands by will in this sort. First, it must be by will in writing. Secondly, he must be seised of an estate in fee-simple; for tenant for another man's life, or tenant in tail, cannot give land by will; by that statute 32 H. VIII. he must be solely seised, and not jointly with another; and then being thus seised, for all the land he holdeth in socage tenure, he may give it by will, except he hold any piece of land *in capite* by knight's service of the King; and then laying all together, he can give but two parts by will: for the third part of the whole, as well in socage as *in capite*, must descend to the heir, to answer wardship, livery, and primer seisin to the crown.

In what manner the stat. of 32 H. 8. giveth power to dispose of lands by will.

If a man be seised of *capite* lands and socage, he cannot devise but two parts of the whole.

The third part must descend to the heir to answer wardship, livery and seisin to the crown.

And so if he hold lands by knight's service of a subject, he can devise of the land but two parts,

and the third the lord by wardship, and the heir by descent is to hold.

A conveyance by devise of *capite* lands to the wife for her jointure, *etc.* void for a third part, by 32 H. VIII.

And if a man that hath three acres of land holden *in capite* by knight's service, do make a jointure to his wife of one, and convey another to any of his children, or to friends, to take the profits, and to pay his debts, or legacies, or daughters portions, then the third acre or any part thereof he cannot give by will, but must suffer it to descend to the heir, and that must satisfy wardship.

But a conveyance by act executed in the life-time of the party of such lands to such uses is not void: but if the heir be within age, he shall have one third to be in ward.

Yet a man having three acres as before, may convey all to his wife, or children, by conveyance in his life-time, as by feoffment, fine, recovery, bargain and sale, or covenant to stand seised to uses, and disinherit the heir. But if the heir be within age when his father dieth, the King or other lord shall have that heir in ward, and shall have one of the three acres during the wardship, and to sue livery and seisin. But at full age the heir shall have no part of it, but it shall go according to the conveyance made by the father.

Entailed lands part of the thirds.

It hath been debated how the thirds shall be set forth. For it is the use, that all lands which the father leaveth to descend to the heir, being fee-simple, or in tail, must be part of the thirds: and if it be a full third, then the King, nor heir, nor lord, can intermeddle with the rest; if it be not a full third, yet they must take it so much as it is, and have a supply out of the rest.

The King nor lord cannot intermeddle if a full third part be left to descend to the heir.

The manner of making supply, when the part of the heir is not a full third.

This supply is to be taken thus; if it be the King's ward, then by a commission out of the court of wards, whereupon a jury by oath must set forth so much as shall make up the thirds, except the officers of the court of wards can otherwise agree with the parties. If there be no wardship due to the King, then the other lord is to have this supply by a commission out of the chancery, and jury thereupon.

The statutes give power to the testator to

But in all those cases, the statutes do give power to him that maketh the will, to set forth and appoint of himself which lands shall go for thirds, and

neither King nor lord can refuse it. And if it be not enough, yet they must take that in part, and only have a supply in manner as before is mentioned out of the rest.

set out the third himself, *etc.*

Property in Goods.

Of the several ways whereby a man may get property in goods or chattels.

- I. By gift.
- II. By sale.
- III. By stealing.
- IV. By waving.
- V. By straying.
- VI. By shipwreck.
- VII. By forfeiture.
- VIII. By executorship.
- IX. By administration.
- X. By legacy.

I. Property by gift.

By gift, the property of goods may be passed by word or writing; but if there be a general deed of gift made of all his goods, this is suspicious to be done upon fraud, to deceive the creditors.

A deed of gift of goods to deceive his creditors is void against them, but good against the executors, administrators, or vendee of the party himself.

And if a man who is in debt make a deed of gift of all his goods to protect the taking of them in execution for his debt, this deed of gift is void, as against those to whom he stood indebted; but as against himself, his own executors or administrators, or any man to whom afterwards he shall sell or convey them, it is good.

II. By sale.

Property in goods by sale. By sale, any man may convey his own goods to another; and although he may fear execution for debts, yet he may sell them out-right for money at any time before the execution served; so that there be no reservation of trust between them, that, repaying the money, he shall have the goods again; for that trust, in such case, doth prove plainly a fraud, to prevent the creditors from taking the goods in execution.

What is a sale *bona fide* and what not, where there is a private reservation of trust between the parties.

III. By theft, or taking in jest.

How a sale in market shall be a bar to the owner.

Property of goods by theft, or taking in jest. If any man steal my goods or chattels, or take them from me in jest, or borrow them of me, or as a trespasser or felon carry them to the market or fair, and sell them, this sale doth bar me of the property of my goods, saving that if he be a horse he must be ridden two hours in the market or fair, between ten and five o'clock, and tolled for in the toll-book, and the seller must bring one to avouch his sale, known to the toll-book-keeper: or else the sale bindeth me not. And for any other goods, where the sale in a market or fair shall bar the owner, being not the seller of his property, it must be sale in a market or fair where usually things of that nature are sold.

Of markets, and what market such a sale ought to be made in.

As for example; if a man steal a horse, and sell him in Smithfield, the true owner is barred by this sale; but if he sell the horse in Cheapside, Newgate, or Westminster market, the true owner is not barred by this sale; because these markets are usual for flesh, fish, *etc.* and not for horses.

So whereas by the custom of London in every shop there is a market all the days of the week, saving Sundays and Holidays; yet if a piece of plate or jewel that is lost, or chain of gold or pearl that is stolen or borrowed, be sold in a draper's or scrivener's shop, or any other but a goldsmith's, this sale barreth not the true owner, *et sic in similibus.*

The owner may seize his goods after they are stolen.

Yet by stealing alone of goods, the thief getteth not such property, but that the owner may seize them again wheresoever he findeth them, except they were sold in fair or market, after they were stolen, and that *bona fide* without fraud.

If the thief be condemned for felony, or outlawed, or forfeit the stolen goods to the crown, the owner is without remedy.

But if the thief be condemned of the felony, or outlawed for the same, or outlawed in any personal action, or have committed a forfeiture of goods to the crown, then the true owner is without remedy.

When the owner may take his goods from

Nevertheless, if fresh after the goods were stolen, the true owner maketh pursuit after the thief and goods, and taketh the goods with the thief, he may take them again: and if he make no fresh pursuit,

yet if he prosecute the felon, so far as justice requireth, that is, to have him arraigned, indicted, and found guilty, though he be not hanged, nor have judgment of death, or have him outlawed upon the indictment; in all these cases he shall have his goods again, by a writ of restitution to the party in whose hands they are.

the thief. If he convict the thief of the same felony, he shall have his goods again by a writ of restitution.

IV. By waving of goods.

By waving of goods, a property is gotten thus. A thief having stolen goods, being pursued, flieth away and leaveth the goods. This leaving is called waving, and the property is in the king; except the lord of the manor have right to it, by custom or charter.

But if the felon be indicted, adjudged, or found guilty, or outlawed, at the suit of the owner of these goods, he shall have restitution of these goods, as before.

V. By straying.

By straying, property in live cattle is thus gotten. When they come into other mens grounds straying from the owners, then the party or lord into whose grounds or manors they come, causeth them to be seised, and a wythe put about their necks, and to be cried in three markets adjoining, shewing the marks of the cattle; which done, if the true owner claimeth them not within a year and a day, then the property of them is in the lord of the manor whereunto they did stray, if he have all strays by custom or charter, else to the king.

VI. Wreck, and when it shall be said to be.

By shipwreck, property of goods is thus gotten. When a ship loaden is cast away upon the coasts, so that no living creature that was in it when it began to sink escaped to land with life, then all those goods are said to be wrecked, and they belong to the crown if they be found; except the lord of the soil adjoining can intitle himself unto them by custom, or by the king's charter.

VII. Forfeitures.

By forfeitures, goods and chattels are thus gotten. If the owner be outlawed, if he be indicted of felony, or treason, or either confess it, or be found guilty of it, or refuse to be tried by peers or jury, or be attainted by judgment, or fly for felony, although he be not guilty, or suffer the exigent to go forth against him, although he be not outlawed, or that he go over the seas without licence, all the goods he had at the judgment, he forfeiteth to the crown; except some lord by charter can claim them. For in those cases prescription will not serve, except it be so ancient, that it hath had allowance before the justices in eyre in their circuits, or in the King's bench in ancient time.

VIII. By executorship.

By executorship goods are thus gotten. When a man possessed of goods maketh his last will and testament in writing or by word, and maketh one or more executors thereof; these executors have, by the will and death of the parties, all the property of their goods, chattels, leases for years, wardships and extents, and all right concerning those things.

Executors may before probat dispose of the goods, but not bring an action for any debt.

Those executors may meddle with the goods, and dispose of them before they prove the will, but they cannot bring an action for any debt or duty before they have proved the will.

What probat of the will is, and in what manner it is made.

The proving of the will is thus. They are to exhibit the will into the bishop's court, and there they are to bring the witnesses, and there they are to be sworn, and the bishop's officers are to keep the will original, and certify the copy thereof in parchment under the bishop's seal of office; which parchment so sealed, is called the will proved.

IX. By letters of administration.

By letters of administration property in goods is thus gotten. When a man possessed of goods dieth without any will, there such goods as the executors should have had, if he had made a will, were by ancient

law to come to the bishop of the diocese, to dispose for the good of his soul that died, he first paying his funeral and debts, and giving the rest *ad pios usus.* *Pii usus.*

This is now altered by statute laws, so as the bishops are to grant letters of administration of the goods at this day to the wife if she requireth it, or children, or next of kin; if they refuse it, as often they do, because the debts are greater than the estate will bear, then some creditor or some other will take it as the bishop's officers shall think meet. It groweth often in question what bishop shall have the right of proving wills, and granting administration of goods.

In † which controversy the rule is thus, that if the party dead had at the time of his death *bona notabilia* in diverse dioceses of some reasonable value, then the archbishop of the province where he died is to have the probat of his will, or to grant the administration of his goods, as the case falieth out: otherwise the bishop of the diocese where he died is to do it.

† Where the intestate had *bona notabilia* in diverse dioceses, then the archbishop of that province where he died is to commit the administration.

If there be but one executor made, yet he may refuse the executorship, coming before the bishop, so that he hath not intermeddled with any of the goods before, or with receiving debts, or paying legacies.

Executor may refuse before the bishop, if he have not intermeddled with the goods.

And if there be more executors than one, so many as list may refuse; and if any one take it upon him, the rest that did once refuse may, when they will, take it upon them; and no executor shall be farther charged with debts or legacies, than the value of the goods come to his hands; so that he foresee that he pay debts upon record, first debts to the King, then upon judgments, statutes, recognisances, then debts by bond and bill sealed, rent unpayed, servants wages, payment to head workmen, and lastly, shop-books and contracts by word. For if an executor or administrator pay debts to others before debts to the King, or debts due by bond before those due by record, or debts by shop-books and contracts before those by bond, arrearages

Executor ought to pay,
1. Judgments.
2. Stat Recogn.
3. Debts by bonds and bills sealed.
4. Rent unpaid.
5. Servants wages.
6. Head workmen.
7. Shop-books and contracts by words.

of rent, and servants or workmens wages, he shall pay the same over again to those others in the said degrees.

Debts due in equal degree of record, the executor may pay which of them he pleasebefore suit commenced.

But yet the law giveth them choice, that where divers have debts due in equal degree of record or specialty, he may pay which of them he will, before any suit brought against him; but if suit be brought he must first pay them that get judgment against him.

Any one executor may do as much as all together: but if a debt be released and assets wanting, he only shall be charged.

Any one executor may convey the goods, or release debts without his companion, and any one by himself may do as much as all together; but one man's releasing of debts or selling of goods, shall not charge the other to pay so much of the goods, if there be not enough to pay debts; but it shall charge the party himself that did so release or convey.

Otherwise of administrators.

But it is not so with administrators, for they have but one authority given them by the bishop over the goods, which authority being given to many is to be executed by all of them joined together.

Executor dieth making his executor, the second executor shall be executor to the first testator.

And if an executor die making an executor, the second executor is executor to the first testator.

But otherwise, if the administrator die making his executor, or if administration be committed of his goods.

But if an administrator die intestate, then his administrator shall not be executor or administrator to the first: but in that case the bishop, whom we call the ordinary, is to commit the administration of the first testator's goods to his wife, or next of kin, as if he had died intestate; always provided, that that which the executor did in his life-time, is to be allowed for good. And so if an administrator die and make his executor, the executor of the administrator shall not be executor to the first intestate; but the ordinary must new commit the administration of the goods of the first intestate again.

In both cases the ordinary shall commit administration of the goods of the first intestate.

Executors or administrators may retain.

If the executor or administrator pay debts, or funerals, or legacies of his own money, he may retain so much of the goods in kind, of the testator or intestate, and shall have property of it in kind.

Executors or administrators

X. Property by legacy.

Property by legacy, is where a man maketh a will

and executors, and giveth legacies, he or they to whom the legacies are given must have the assent of the executors, or one of them, to have his legacy; and the property of that legacy or other goods bequeathed unto him, is said to be in him; but he may not enter nor take his legacy without the assent of the executors, or one of them; because the executors are charged to pay debts before legacies. And if one of them assent to pay legacies, he shall pay the value thereof of his own purse, if there be not otherwise sufficient to pay debts.

may retain; because the executors are charged to pay some debts before legacies.

But this is to be understood by debts of record to the King, or by bill and bond sealed, or arrearages of rent, or servants or workmens wages; and not debts of shop-books, or bills unsealed, or contract by word; for before them legacies are to be paid.

Legacies are to be paid before debts by shop-books, bills unsealed, or contracts by word.

And if the executors doubt that they shall not have enough to pay every legacy, they may pay which they list first; but they may not sell any special legacy which they will to pay debts, or a lease of goods to pay a money legacy. But they may sell any legacy which they will to pay debts, if they have not enough besides.

Executor may pay which legacy he will first. If the executors do want, they may sell any legacy to pay debts.

If a man make a will and make no executors, or if the executors refuse, the ordinary is to commit administration, *cum testamento annexo*, and take bonds of the administrators to perform the will, and he is to do it in such sort, as the executor should have done, if he had been named.

When a will is made and no executor named, administration is to be committed *cum testamento annexo*.

AN

ACCOUNT

OF THE

LATELY ERECTED SERVICE,

CALLED,

THE OFFICE

OF

COMPOSITIONS FOR ALIENATIONS.

WRITTEN [ABOUT THE CLOSE OF 1598] BY
MR. FRANCIS BACON,

And published from a MS. in the Inner-Temple Library.

The sundry sorts of the royal revenue.

ALL the finances or revenues of the imperial crown of this realm of England, be either extraordinary or ordinary.

Those extraordinary, be fifteenths and tenths, subsidies, loans, benevolences, aids, and such others of that kind, that have been or shall be invented for supportation of the charges of war; the which as it is entertained by diet, so can it not be long maintained by the ordinary fiscal and receipt.

Of these that be ordinary, some are certain and standing, as the yearly rents of the demesne or lands; being either of the ancient possessions of the crown, or of the later augmentations of the same.

Likewise the fee-farms reserved upon charters granted to cities and towns corporate, and the blanch rents and lath silver answered by the sheriffs. The residue of these ordinary finances be casual, or uncertain, as be the escheats and forfeitures, the customs, butlerage and impost, the advantages coming by the jurisdiction of the courts of record and clerks of the market, the temporalities of vacant bishoprics, the profits that grow by the tenures of lands, and such like, if there any be.

And albeit that both the one sort and other of these be at the last brought unto that office of her majesty's

exchequer, which we, by a metaphor, do call the pipe, as the civilians do by a like translation name it *Fiscus*, a basket or bag, because the whole receipt is finally conveyed into it by the means of divers small pipes or quills, as it were water into a great head or cistern; yet nevertheless some of the same be first and immediately left in other several places and courts, from whence they are afterwards carried by silver streams, to make up that great lake, or sea, of money. The pipe.

As for example, the profits of wards and their lands be answered into that court which is proper for them; and the fines for all original writs, and for causes that pass the great seal, were wont to be immediately paid into the hanaper of the chancery: howbeit now of late years, all the sums which are due, either for any writ of covenant, or of other sort, whereupon a final concord is to be levied in the common bench, or for any writ of entry, whereupon a common recovery is to be suffered there; as also all sums demandable, either for licence of alienation to be made of lands holden in chief, or for the pardon of any such alienation, already made without licence, together with the mean profits that be forfeited for that offence and trespass, have been stayed in the way to the hanaper, and been let to farm, upon assurance of three hundred pound of yearly standing profit, to be increased over and above that casual commodity, that was found to be answered in the hanaper for them, in the ten years, one with another, next before the making of the same lease. The hanaper. This office is derived out of the hanaper.

And yet so as that yearly rent of increase is now still paid into the hanaper by four gross portions, not altogether equal, in the four usual open terms of St. Michael, and St. Hilary, of Easter, and the Holy Trinity, even as the former casualty itself was wont to be, in parcel meal, brought in and answered there.

And now forasmuch as the only matter and subject about which this farmer or his deputies are employed, is to rate or compound the sums of money payable to her majesty, for the alienation of lands that are either made without licence, or to be made by licence, if The name of the office.

they be holden in chief, or to pass for common recovery, or by final concord to be levied, though they be not so holden, their service may therefore very aptly and agreeably be termed the office of compositions for alienations. Whether the advancement of her majesty's commodity in this part of her prerogative, or the respect of private lucre or both, were the first motives thus to dissever this member, and thereby as it were to mayhem the chancery, it is neither my part nor purpose to dispute.

The scope of the discourse, and the parts thereof.

But for a full institution of the service as it now standeth, howsoever some men have not spared to speak hardly thereof, I hold worthy my labour to set down as followeth.

First, that these fines, exacted for such alienations, be not only of the greatest antiquity, but are also good and reasonable in themselves: secondly, that the modern and present exercise of this office, is more commendable than was the former usage: and lastly, that as her majesty hath received great profit thereby, so may she, by a moderate hand, from time to time reap the like, and that without just grief to any of her subjects.

The first part of this treatise.

As the lands that are to be aliened, be either immediately holden in chief, or not so holden of the queen: so be these fines or sums respectively of two sundry sorts. For upon each alienation of lands, immediately held of her majesty in chief, the fine is rated here, either upon the licence, before the alienation is made, or else upon the pardon when it is made without licence. But generally for every final concord of lands to be levied upon a writ of covenant, *warrantia chartæ*, or other writ, upon which it may be orderly levied, the sum is rated here upon the original writ, whether the lands be held of the queen, or of any other person; if at the least the lands be of such value, as they may yield the due fine. And likewise for every writ of entry, whereupon a common recovery is to be suffered, the queen's fine is to be rated there upon the writ original, if the lands comprised therein be held of her by the

tenure of her prerogative, that is to say, in chief, or of her royal person.

So that I am hereby inforced, for avoiding of confusion, to speak severally, first of the fines for alienation of lands held in chief, and then of the fines upon the suing forth of writs original. That the king's tenant in chief could not in ancient time alien his tenancy without the king's licence, it appeareth by the statute, 1 E. III. *cap.* 12. where it is thus written: "Whereas divers do complain, that the lands, holden "of the king in chief, and aliened without licence, "have been seized into the king's hands for such "alienation, and holden as forfeit: the king shall not "hold them as forfeit in such a case, but granteth "that, upon such alienations, there shall be reasonable "fines taken in the chancery by due process."

The king's tenant in chief could never alien without licence.

1 E. III. c. 12.

So that it is hereby proved, that before this statute, the offence of such alienation, without licence, was taken to be so great, that the tenant did forfeit the land thereby; and consequently that he found great favour there by this statute, to be reasonably fined for his trespass.

And although we read an opinion 20 *lib. Assis. parl.* 17, *et* 26. *Ass. parl.* 37. which also is repeated by Hankf. 14 *H.* 4. *fol.* 3. in which year Magna Charta was confirmed by him, the king's tenant in chief might as freely alien his lands without licence, as might the tenant of any other lord: yet forasmuch as it appeareth not by what statute the law was then changed, I had rather believe, with old judge Thorpe and late justice Stanford, that even at the common law, which is as much as to say, as from the beginning of our tenures, or from the beginning of the English monarchy, it was accounted an offence in the king's tenant in chief, to alien without the royal and express licence.

And I am sure, that not only upon the entering, or recording, of such a fine for alienation, it is wont to be said *pro transgressione in hac parte facta;* but that you may also read amongst the records in the Tower, *Fines* 6 *Hen. Reg.* 3. *Memb.* 4. a precedent of a

capias in manum regis terras alienatas sine licentia regis, and that namely of the manor of Coselescombe in Kent, whereof Robert Cesterton was then the king's tenant in chief. But were it that, as they say, this began first 20 Hen. III. yet it is above three hundred and sixty years old, and of equal if not more antiquity than Magna Charta itself, and the rest of our most ancient laws; the which never found assurance by parliament, until the time of King Edw. I. who may be therefore worthily called our English Solon or Lycurgus.

The fine for alienation is moderate.

Now therefore to proceed to the reason and equity of exacting these fines for such alienations, it standeth thus: when the king, whom our law understandeth to have been at the first both the supreme lord of all the persons, and sole owner of all the lands within his dominions, did give lands to any subject to hold them of himself, as of his crown and royal diadem, he vouchsafed that favour upon a chosen and selected man, not minding that any other should, without his privity and good liking, be made owner of the same. And therefore his gift has this secret intention inclosed within it, that if his tenant and patentee shall dispose of the same without his kingly assent first obtained, the lands shall revert to the king, or to his successors, that first gave them: and that also was the very cause, as I take it, why they were anciently seized into the king's hands as forfeited by such alienation, until the making of the said statute, 1 Edw. III. which did qualify that rigour of the former law.

Neither ought this to seem strange in the case of the king, when every common subject, being lord of lands which another holdeth of him, ought not only to have notice given unto him upon every alienation of his tenant, but shall, by the like implied intention, re-have the lands of his tenants dying without heirs, though they were given out never so many years agone, and have passed through the hands of howsoever many and strange possessors.

Not without good warrant, therefore, said Mr. Fitzherbert in his *Nat. Brev. fol.* 147. that the justices

ought not wittingly to suffer any fine to be levied of lands holden in chief, without the king's licence. And as this reason is good and forcible, so is the equity and moderation of the fine itself most open and apparent; for how easy a thing is it to redeem a forfeiture of the whole lands for ever with the profits of one year, by the purchase of a pardon? Or otherwise, how tolerable is it to prevent the charge of that pardon, with the only cost of a third part thereof, timely and beforehand bestowed upon a licence?

The antiquity and moderation of fines upon writs original.

Touching the king's fines accustomably paid for the purchasing of writs original, I find no certain beginning of them, and do therefore think that they also grew up with the chancery, which is the shop wherein they be forged; or, if you will, with the first ordinary jurisdiction and delivery of justice itself.

For when as the king had erected his courts of ordinary resort, for the help of his subjects in suit one against another, and was at the charge not only to wage justices and their ministers, but also to appoint places and officers for safe custody of the records that concerned not himself; by which means each man might boldly both crave and have law for the present, and find memorials also to maintain his right and recovery, for ever after, to the singular benefit of himself and all his posterity; it was consonant to good reason, that the benefited subject should render some small portion of his gain, as well towards the maintenance of this his own so great commodity, as for the supportation of the king's expence, and the reward of the labour of them that were wholly employed for his profit.

Litt. 34 H. 6. fol. 38.

And therefore it was well said by Littleton, 34 *H.* 6. *fol.* 38. that the chancellor of England is not bound to make writs, without his due fee for the writing and seal of them. And that, in this part also, you may have assurance of good antiquity, it is extant among the records in the Tower, 2 *H.* III. *Memb.* 6. that Simon Hales and others gave unto him their king, *unum palfredum pro summonendo Richardo filio et hærede Willielmi de Hanred, quod teneat finem fac-*

tum coram justiciariis apud Northampton inter dictum Willielmum et patrem dicti Arnoldi de feodo in Barton. And besides that, *in oblatis de Ann.* 1, 2, & 7. *regis Johannis,* fines were diversely paid to the king, upon the purchasing writs of mort d'auncestor, dower, pone, to remove pleas, for inquisitions, trial by juries, writs of sundry summons, and other more.

Hereof then it is, that upon every writ procured for debt or damage, amounting to forty pounds or more, a noble, that is, six shillings and eight pence, is, and usually hath been paid to fine; and so for every hundred marks more a noble: and likewise upon every writ called a *præcipe* of lands, exceeding the yearly value of forty shillings, a noble is given to a fine; and for every other five marks by year, moreover another noble, as it is set forth 20 Rich. II. abridged both by justice Fitzherbert, and justice Brooke; and may also appear in the old *Natura Brevium,* and the Register, which have a proper writ of deceipt, formed upon the case, where a man did, in the name of another, purchase such a writ in the chancery without his knowledge and consent.

20 Rich. II.

And herein the writ of right is excepted and passeth freely; not for fear of the words in *Magna Charta, Nulli vendemus justitiam vel rectum,* as some do phantasy, but rather because it is rarely brought; and then also bought dearly enough without such a fine, for that the trial may be by battle to the great hazard of the champion.

The like exemption hath the writ to enquire of a man's death, which also, by the twenty-sixth chapter of that *Magna Charta,* must be granted freely, and without giving any thing for it: which last I do rather note, because it may be well gathered thereby, that even then all those other writs did lawfully answer their due fines: for otherwise the like prohibition would have been published against them, as was in this case of the inquisition itself.

I see no need to maintain the mediocrity and easiness of this last sort of fine, which in lands exceedeth not the tenth part of one year's value, and in goods

the two hundredth part of the thing that is demanded by the writ.

Neither has this office of ours *originally to meddle with the fines of any other original writs, than of such only as whereupon a fine or concord may be had and levied; which is commonly the writ of covenant, and rarely any other. For we deal not with the fine of the writ of entry of lands holden in chief, as due upon the original writ itself; but only as payable in the nature of a licence for the alienation, for which the third part of the yearly rent is answered; as the statute 32 H. VIII. *cap.* 1. hath specified, giving the direction for it; albeit now lately the writs of entry be made parcel of the parcel ferm also; and therefore I will here close up the first part, and unfold the second.

* *Right*, or some word of the like import, seems to be omitted here.

Before the institution of this ferm and office, no writ of covenant for the levying any final concord, no writ of entry for the suffering of any common recovery of lands holden in chief, no doquet for licence to alien, nor warrant for pardon of alienation made, could be purchased and gotten without an oath called an affidavit, therein first taken either before some justice of assize, or master of the chancery, for the true discovery of the yearly value of the lands comprised in every of the same; in which doing, if a man shall consider on the one side the care and severity of the law, that would not be satisfied without an oath; and on the other side the assurance of the truth to be had by so religious an affirmation as an oath is, he will easily believe that nothing could be added unto that order, either for the ready dispatch of the subject, or for the uttermost advancement of the king's profit. But *quid verba audiam, cum facta videam?* Much peril to the swearer, and little good to our sovereign hath ensued thereof. For on the one side the justices of assize were many times abused by their clerks, that preferred the recognitions of final concords taken in their circuit: and the masters of the chancery were often overtaken by the fraud of solicitors and attorneys, that followed their clients causes here at West-

The second part of this treatise.

All fines upon oath.

minster; and on the other side, light and lewd persons, especially, that the exactor of the oath did neither use exhortation, nor examining of them for taking thereof, were as easily suborned to make an affidavit for money, as post-horses and hackneys are taken to hire in Canterbury and Dover way: insomuch that it was usual for him that dwelt in Southwark, Shoreditch, or Tothil-Street, to depose the yearly rent or valuation of lands lying in the north, the west, or other remote part of the realm, where either he never was at all, or whence he came so young, that little could he tell what the matter meaned: And thus *consuetudinem peccandi fecit multitudo peccantium.* For the removing of which corruption, and of some others whereof I have long since particularly heard, it was thought good that the justice of assize should be intreated to have a more vigilant eye upon their clerks writing; and that one special master of the chancery should be appointed to reside in this office, and to take the oaths concerning the matters that come hither: who might not only reject such as for just causes were unmeet to be sworn, but might also instruct and admonish in the weight of an oath, those others that are fit to pass and perform it: and forasmuch as thereby it must needs fall out very often, that either there was no man ready and at hand that could with knowledge and good conscience undertake the oath, or else, that such honest persons as were present, and did right well know the yearly value of the lands, would rather choose and agree to pay a reasonable fine without any oath, than to adventure the uttermost, which, by the taking of their oath, must come to light and discovery: It was also provided, that the fermour, and the deputies, should have power to treat, compound and agree with such, and so not exact any oath at all of them.

How much this sort of finance hath been increased by this new device, I will reserve, as I have already plotted it, for the last part of this discourse: but in the mean while I am to note first, that the fear of common perjury, growing by a daily and over-usual ac-

quaintance with an oath, by little and little razeth out that most reverend and religious opinion thereof, which ought to be planted in our hearts, is hereby for a great part cut off and clean removed: then that the subject yieldeth little or nothing more now than he did before, considering that the money, which was wont to be saved by the former corrupt swearing, was not saved unto him, but lost to her majesty and him, and found only in the purse of the clerk, attorney, solicitor, or other follower of the suit: and lastly, that the client, besides the benefit of retaining a good conscience in the passage of this his business, hath also this good assurance, that he is always a gainer, and by no means can be at any loss, as seeing well enough, that if the composition be over-hard and heavy for him, he may then, at his pleasure, relieve himself by recourse to his oath; which also is no more than the ancient law and custom of the realm hath required at his hands. And the self-same thing is moreover, that I may shortly deliver it by the way, not only a singular comfort to the executioners of this office, a pleasant seasoning of all the sour of their labour and pains, when they shall consider that they cannot be guilty of the doing of any oppression or wrong; but it is also a most necessary instruction and document for them, that even as her majesty hath made them dispensators of this her royal favour towards her people, so it behoveth them to shew themselves *peregrinatores*, even and equal distributers of the same; and, as that most honourable lord and reverend sage counsellor, the *late lord Burleigh, late lord treasurer, said to myself, to deal it out with wisdom and good dexterity towards all the sorts of her loving subjects.

* This passage ascertains the date of this writing.

The part of each officer.

But now that it may yet more particularly appear what is the sum of this new building, and by what joints and sinews the same is raised and knit together, I must let you know, that besides the fermours deputies, which at this day be three in number, and besides the doctor of whom I spake, there is also a receiver, who alone handleth the moneys, and three clerks, that be employed severally, as anon you shall perceive;

and by these persons the whole proceeding in this charge is thus performed.

Proceeding upon fines.

If the recognition or acknowledgment of a final concord upon any writ of covenant finable, for so we call that which containeth lands above the yearly value of forty shillings, and all others we term unfinable, be taken by justice of assize, or by the chief justice of the common pleas, and the yearly value of those lands be also declared by affidavit made before the same justice; then is the recognition and value, signed with the handwriting of that justice, carried by the cursitor in chancery for that shire where those lands do lie, and by him is a writ of covenant thereupon drawn and ingrossed in parchment; which, having the same value indorsed on the backside thereof, is brought, together with the said paper that doth warrant it, into this office: and there first the doctor, conferring together the paper and writ, indorseth his name upon that writ, close underneath the value thereof: then forasmuch as the valuation thereof is already made, that writ is delivered to the receiver, who taketh the sum of money that is due, after the rate of that yearly value, and indorseth the payment thereof upon the same writ accordingly: this done, the same writ is brought to the second clerk, who entereth it into a several book, kept only for final writs of covenant, together with the yearly value, and the rate of the money paid, with the name of the party that made the affidavit, and of the justice that took it; and at the foot of that writ maketh a secret mark of his said entry: lastly, that writ is delivered to the deputies, who seeing that all the premises be orderly performed, do also indorse their own names upon the same writ for testimony of the money received. Thus passeth it from this office to the *custos brevium*, from him to the queen's silver, then to the chirographer to be ingrossed, and so to be proclaimed in the court. But if no affidavit be already made touching the value, then is the writ of covenant brought first to the deputies ready drawn and ingrossed: and then is the value made either by composition had with them without any oath, or else by oath

taken before the doctor; if by composition, then one of the deputies setteth down the yearly value, so agreed upon, at the foot of the backside of the writ; which value the doctor causeth one of the clerks to write on the top of the backside of the writ, as the cursitor did in the former, and after that the doctor indorseth his own name underneath it, and so passeth it through the hands of the receiver, of the clerk that maketh the entry, and of the deputies, as the former writ did. But if the valuation be made by oath taken before the doctor, then causeth he the clerk to indorse that value accordingly, and then also subscribeth he his name as before; and so the writ taketh the same course through the office that the others had.

Proceeding upon writs of entry.

And this is the order for writs of covenant that be finable: the like whereof was at the first observed, in the passing of writs of entry of lands holden in chief: saving that they be entered into another book, especially appointed for them and for licences and pardons of alienations; and the like is now severally done with the writs of entry of lands not so holden: which writs of covenant or entry not finable, thus it is done: an affidavit is made either before some such justice, or before the said doctor, that the lands, comprised in the writ, be not worth above forty shillings by the year, to be taken. And albeit now here can be no composition, since the queen is to have no fine at all for unfinable writs, yet doth the doctor indorse his name, and cause the youngest, or third clerk, both to make entry of the writ into a third book, purposely kept for those only writs, and also to indorse it thus, *finis nullus:* That done, it receiveth the names of the deputies, indorsed as before, and so passeth hence to the *custos brevium* as the rest. Upon every doquet for licence of alienation, or warrant for pardon of alienation, the party is likewise at liberty either to compound with the deputies, or to make affidavit touching the yearly value; which being known once and set down, the doctor subscribeth his name, the receiver taketh the money after the due rate and proportion; the second clerk entereth the doquet or warrant into the

book that is proper for them, and for the writs of entry, with a notice also, whether it passeth by oath or by composition: then do the deputies sign it with their hands, and so it is conveyed to the deputy of Mr. Bacon, clerk of the licences, whose charge it is to procure the hand of the lord chancellor, and consequently the great seal for every such licence or pardon.

Proceeding upon forfeiture of mean profits.

There yet remaineth untouched, the order that is for the mean profits; for which also there is an agreement made here when it is discovered that any alienation hath been made of lands holden in chief, without the queen's licence; and albeit that in the other cases, one whole year's profit be commonly payable upon such a pardon, yet where the alienation is made by devise in a last will only, the third part of these profits is there demandable, by special provision there-

34 H. VIII. c. 5.

of made in the statute 34 H. VIII. c. 5. but yet every way the yearly profits of the lands so aliened without licence, and lost even from the time of the writ of *scire facias*, or inquisition thereupon returned into the exchequer, until the time that the party shall come hither to sue forth his charter of pardon for that offence.

In which part the subject hath in time gained double ease of two weighty burdens, that in former ages did grievously press him: the one before the institution of this office, and the other sithence; for in ancient time, and of right, as it is adjudged 46 E. III. *Fitzh. forfait* 18. the mean profits were precisely answered after the rate and proportion *per diem*, even from the time of the alienation made. Again, whereas before the receipt of them in this office, they were assessed by the affidavit from the time of the inquisition found, or *scire facias* returned, now not so much at any time as the one half, and many times not the sixth part of them, is exacted. Here therefore, above the rest, is great necessity to shew favour and merciful dealing: because it many times happeneth, that either through the remote dwelling of the party from the lands, or by the negligence or evil practice of under-sheriffs and their bailiffs, the owner hath incurred the forfeiture of eight or ten years whole profits of his lands, before he

cometh to the knowledge of the process that runneth against him: other times an alienation made without licence is discovered when the present owner of the lands is altogether ignorant that his lands be holden in chief at all: other times also some man concludeth himself to have such a tenure by his own suing forth of a special writ of livery, or by causeless procuring a licence, or pardon, for his alienation, when in truth the lands be not either holden at all of her majesty, or not holden in chief, but by a mean tenure in socage, or by knight's service at the most. In which cases, and the like, if the extremity should be rigorously urged and taken, especially where the years be many, the party should be driven to his utter overthrow, to make half a purchase, or more, of his own proper land and living.

The chief clerk.

About the discovery of the tenure in chief, following of process for such alienation made, as also about the calling upon sheriffs for their accounts, and the bringing in of the parties by seisure of their lands, therefore the first and principal clerk in this office, of whom I had not before any cause to speak, is chiefly and in a manner wholly occupied and set on work. Now if it do at any time happen, as, notwithstanding the best endeavour, it may and doth happen, that the process, howsoever colourably awarded, hath not hit the very mark whereat it was directed, but haply calleth upon some man who is not of right to be charged with the tenure in chief, that is objected against; then is he, upon oath and other good evidence, to receive his discharge under the hands of the deputies, but with a *quousque*, and with *salvo jure dominæ*. Usage and deceivable manner of awarding process cannot be avoided, especially where a man, having in some one place both lands holden in chief, and other lands not so holden, alieneth the lands not holden: seeing that it cannot appear by record nor otherwise, without the express declaration and evidences of the party himself, whether they be the same lands that be holden, or others. And therefore albeit the party grieved thereby may have some reason to complain of an un-

The discharge of him that holdeth not in chief when he is sued erroneously.

true charge, yet may he not well call it an unjust vexation; but ought rather to look upon that ease, which in this kind of proceeding he hath found, where, besides his labour, he is not to expend above two and twenty shillings in the whole charge, in comparison of that toil, cost, and care, which he in the case was wont to sustain by the writ of *certiorari* in the exchequer; wherein, besides all his labour, it did cost him fifty shillings at the least, and sometimes twice so much, before he could find the means to be delivered.

Policy for avoiding corruption.

Thus have I run through the whole order of this practice, in the open time of the term; and that the more particularly and at full, to the end that thereby these things ensuing, might the more fully appear, and plainly bewray themselves: first, that this present manner of exercising of this office hath so many testimonies, interchangeable warrants, and counter-rolments, whereof each, running through the hands and resting in the power of so many several persons, is sufficient to argue and convince all manner of falsehood; so as with a general conspiracy of all those offices together, it is almost impossible to contrive any deceit therein: a right ancient, and sound policy, whereupon both the order of the accounts in the exchequer, and of the affairs of her majesty's own houshold, are so grounded and built, that the infection of an evil mind in some one or twain cannot do any great harm, unless the rest of the company be also poisoned by their contagion. And surely, as Cicero said, *Nullum est tam desperatum collegium, in quo non unus e multis sit sana mente præditus.* Secondly, that here is great use both of discretion, learning, and integrity: of discretion, I say, for examining the degrees of favour, which ought to be imparted diversly, and for discerning the valuations of lands, not in one place or shire, but in each county and corner of the realm; and that not of one sort or quality, but of every kind, nature, and degree: for a taste whereof, and to the end that all due quality of rates be not suddenly charged with infidelity, and condemned for corruption; it is note-worthy, that favour is here sometimes right worthily bestowed, not

Inequality of rates justifiable.

only in a general regard of the person, by which every man ought to have a good pennyworth of his own, but more especially also and with much distinction: for a peer of the realm, a counsellor of state, a judge of the land, an officer that laboureth in furtherance of the tenure, or a poor person, are not, as I think, to be measured by the common yard, but by the pole of special grace and dispensation. Such as served in the wars have been permitted, by many statutes, to alien their lands of this tenure, without suing out of any licence. All those of the chancery have claimed and taken the privilege to pass their writs without fine; and yet therefore do still look to be easily fined: yea the favourites in court, and as many as serve the queen in ordinary, take it unkindly if they have not more than market measure. **The person.**

Again, the consideration of the place or county where the lands do lie, may justly cause the rate or valuation to be the more or less; for as the writs to commonly report the land by numbers of acres, and as it is allowable, for the eschewing of some dangers, that those numbers do exceed the very content and true quantity of the lands themselves; so in some counties they are not much acquainted with admeasurement by acre: and thereby, for the most part, the writs of those shires and counties do contain twice or thrice so many acres more than the land hath. In some places the lands do lie open in common fields, and be not so valuable as if they were inclosed: and not only in one and the same shire, but also within the self-same lordship, parish, or hamlet, lands have their divers degrees of value, through the diversity of their fertility or barrenness: wherein how great odds and variety there is, he shall soonest find, that will examine it by his own skill in whatsoever place that he knoweth best. **The place.**

Moreover, some lands be more chargeable than others are, respecting either the tenure, as knight's service, and the tenure in chief, or in regard of defence against the sea and great rivers; as for their lying near to the borders of the realm, or because of great and continual purveyances that are made upon them, or such like.

And in some counties, as namely westward, their yearly rents, by which most commonly their value to her majesty is accounted, are not to this day improved at all, the landlords making no less gain by fines and incomes, than there is raised in other places by inhancement of rents.

The manner of that assurance.

The manner and sorts of the conveyance of the land itself is likewise variable, and therefore deserveth a diverse consideration and value: for in a pardon one whole year's value, together with the mean rates thereof, is due to be paid; which ought therefore to be more favourably assessed, than where but a third part of one year's rent, as in a licence or writ of entry, or where only a tenth part, as in a writ of covenant, is to be demanded.

A licence also and a pardon are to pass the charges of the great seal, to the which the bargain and sale, the fine and recovery are not subject. Sometimes upon one only alienation and change, the purchaser is to pass both licence, fine and recovery, and is for this multiplicity of payments more to be favoured, than he which bringeth but one single pay for all his assurance.

Moreover, it is very often seen that the same land suffereth sundry transmutations of owners within one term, or other small compass of time; by which return much profit cometh to her majesty, though the party feel of some favour in that doing.

The end of conveyances.

Neither is it of small moment in this part, to behold to what end the conveyances of land be delivered: seeing that sometimes it is only to establish the lands in the hands of the owner and his posterity, without any alienation and change of possession to be made: sometimes a fine is levied only to make good a lease for years, or to pass an estate for life, upon which no yearly rent is reserved; or to grant a reversion, or remainder, expectant upon a lease, or estate, that yieldeth no rent. Sometimes the land is given in mortgage only, with full intention to be redeemed within one year, six months, or a lesser time. Many assurances do also pass to godly and charitable uses alone; and it happeneth not seldom, that, to avoid the yearly oath, for

averment of the continuance of some estate for life, which is eigne, and not subject to forfeiture, for the alienation that cometh after it, the party will offer to sue a pardon uncompelled before the time; in all which some mitigation of the uttermost value may well and worthily be offered, the rather for that the statute, 1 E. III. cap. 12. willeth, that in this service generally a reasonable fine shall be taken. 1 E. III. c. 12.

Lastly, error, misclaim, and forgetfulness, do now and then become suitors for some remission of extreme rigour: for I have sundry times observed, that an assurance, being passed through for a competent fine, hath come back again by reason of some oversight, and the party hath voluntarily repassed it within a while after. Sometimes the attorney, or follower of the cause, unskilfully thrusteth into the writ, both the uttermost quantity, or more, of the land, and the full rent also that is given for it: or else setteth down an entierty, where but a moiety, a third, or fourth part only was to be passed; or causeth a bargain and sale to be inrolled, when nothing passed thereby, because a fine had transferred the land before; or else inrolleth it within the six months; whereas, before the end of those months, the land was brought home to the first owner, by repayment of the money for which it was engaged. In which and many other like cases, the client will rather choose to give a moderate fine for the alienation so recharged, than to undertake a costly plea in the exchequer, for reformation of that which was done amiss. I take it for a venial fault also to vouchsafe a pardon, after the rate and proportion of a licence, to him that without fraud or evil mind hath slipped a term or two months, by forgetting to purchase his licence. Error and mistaking.

Much more could I say concerning this unblameable inequality of fines and rates: but as I meant only to give an essay thereof, so not doubting but that this may stand, both for the satisfaction of such as be indifferent, and for the discharge of us that be put in trust with the service, wherein no doubt a good discretion and dexterity ought to be used, I resort to the place

where I left, affirming that there is in this employment of ours great use of good learning also, as well to distinguish the manifold sorts of tenures and estates; to make construction of grants, conveyances and wills, and to sound the validity of inquisitions, liveries, licences, and pardons: as also to decipher the manifold slights and subtleties that are daily offered to defraud her majesty in this her most ancient and due prerogative, and finally to handle many other matters, which this purpose will not permit me to recount at large.

Lastly, here is need, as I said, of integrity throughout the whole labour and practice, as without the which both the former learning and discretion are no better than *armata nequitia*, and nothing else but detestable craft and double villany.

And now as you have seen that these clerks want not their full task of labour during the time of the open term, so is there for them whereupon to be occupied in the vacation also.

For whereas alienations of lands, holden by the tenure of prerogative, be continually made, and that by many and divers ways, whereof all are not, at the first, to be found of record; and yet for the most part do come to be recorded in the end: the clerks of this office do, in the time of the vacation, repair to the rolls and records, as well of the chancery and king's bench, as of the common pleas and exchequer, whence they extract notes not only of inquisitions, common recoveries, and indentures of bargains and sales, that cannot but be of record, but also of such feoffments, exchanges, gifts by will, and indentures of covenants to raise uses of lands holden in chief, as are first made in the country without matter of record, and come at the length to be found by office or inquisition, that is of record; all which are digested into apt books, and are then sent to the remembrancer of the lord treasurer in the exchequer, to the end that he may make and send out processes upon them, as he doth upon the extracts of the final concords of such lands, which the clerk of the fines doth convey unto him.

Thus it is plain, that this new order by many degrees excelleth the former usage; as also for the present advancement of her majesty's commodity, and for the future profit which must ensue by such discovery of tenures as were concealed before, by awaking of such as had taken a long sleep, and by reviving a great many that were more than half dead.

The fees or allowances, that are termly given to these deputies, receiver, and clerks, for recompence of these their pains, I do purposely pretermit; because they be not certain, but arbitrary, at the good pleasure of those honourable persons that have the dispensation of the same: howbeit hitherto each deputy and the receiver hath received twenty pounds for his travel in each term, only the doctor hath not allowance of any sum in gross, but is altogether paid in petty fees, by the party or suitor; and the clerks are partly rewarded by that mean also, for their entries, discharges, and some other writings, besides that termly fee which they are allowed.

But if the deputies take one penny, besides their known allowance, they buy it at the dearest price that may be; I mean the shipwreck of conscience, and with the irrecoverable loss of their honesty and credit; and therefore since it appeareth which way each of these hath his reward, let us also examine that increase of benefit and gain, which is brought to her majesty by the invention of this office. Note.

At the end of Hilary term 1589, being the last open term of the lease of these profits granted to the late earl of Leicester, which also was to expire at the feast of the Annunciation of the blessed Virgin Mary 1590, then shortly to ensue; the officers above remembered thought it, for good causes, their duties to exhibit to the said right honourable the lord treasurer a special declaration of the yearly profits of these finances, paid into the hanaper during every of the six years before the beginning of the demise thereof made to that earl, conferred with the profits thereof that had been yearly taken during the six last years before the determination of the lease. By which it plainly appeared, that in all

those first six years, next before the demise, there had been raised only 12798*l.* 15*s.* 7*d.* ob. and in these last six years of the demise the full sum of 32160*l.* 4*s.* 10*d.* qu. and so in all 19362*l.* 2*s.* 2*d.* ob. qu. more in these last, than in those former six years. But because it may be said, that all this increase redounded to the gain of the fermor only, I must add, that during all the time of the demise, he answered 300*l.* rent, of yearly increase, above all that profit of 2133*l.* 2*s.* 7*d.* qu. which had been yearly and casually made in the sixteen years one with another next before: the which, in the time of fourteen years, for so long these profits have been demised by three several leases, did bring 4200*l.* to her majesty's coffers. I say yearly; which may seem strange, that a casual and thereby uncertain profit should yearly be all one: but indeed such was the wonderous handling thereof, that the profit was yearly neither more nor less to her majesty, howsoever it might casually be more or less to him that did receive it. For the writs of covenant answered year by year 1152*l.* 16*s.* 8*d.* the licences and pardons 934*l.* 3*s.* 11*d.* qu. and the mean rates 46*l.* 2*s.* in all 2133*l.* 2*s.* 7*d.* qu. without increase or diminution.

Moreover, whereas her majesty did, after the death of the earl, buy of the countess, being his executrix, the remanent of the last term of three years in those profits, whereof there were only then six terms, that is, about one year and an half, to come, paying for it the sum of 3000*l.* her majesty did clearly gain by that bargain the full sum of 1173*l.* 15*s.* 8*d.* ob. above the said 3000*l.* above the rent of 3649*l.* 13*s.* 10*d.* ob. qu. proportionably due for that time, and above all fees and other reprises. Neither hath the benefit of this increase to her majesty been contained within the bounds of this small office, but hath swelled over the banks thereof, and displayed itself apparently, as well in the hanaper, by the fees of the great seal, which yielding 20*s.* 4*d.* towards her majesty for every licence and pardon, was estimated to advantage her highness during those fourteen years, the sum of 3721*l.* 6*s.* ob. qu. more than without that demise she was like to have

found. As also in the court of wards and liveries, and in the exchequer itself: where, by reason of the tenures in chief revived through the only labours of these officers, both the sums for respect of homage be increased, and the profits of wardships, primer seisins, ouster le maine, and liveries, cannot but be much advanced. And so her majesty's self hath, in this particular, gained the full sum of 8736*l.* 5*s.* 5*d.* ob. qu. not comprising those profits in the exchequer and court of wards, the very certainty whereof lieth not in the knowledge of these officers, nor accounting any part of that great benefit which the earl and his executrix have made by the demises: which one year with another, during all the thirteen years and a half, I suppose to have been 2263*l.* or thereabouts; and so in all about 27158*l.* above all his costs and expences. The which albeit I do here report only for the justification of the service in this place; yet who cannot but see withal, how much the royal revenues might be advanced, if but the like good endeavours were shewed for her majesty in the rest of her finances, as have been found in this office for the commodity of this one subject?

The views of all which matter being presented to the most wise and princely consideration of her majesty, she was pleased to demise these profits and fines for other five years, to begin at the feast of the Annunciation 1590, in the thirty-second year of her reign, for the yearly rent formerly reserved upon the leases of the earl; within the compass of which five years, expired at the Annunciation 1595, there was advanced to her majesty's benefit, by this service, the whole sum of 13013*l.* 14*s.* 1*d.* qu. beyond the ancient yearly revenues, which, before any lease, were usually made of these finances. To which if there be added 5700*l.* for the gain given to her majesty by the yearly receipt of 300*l.* in rent, from the first demise to the earl, until the time of his death, together with the sum of 1173*l.* 15*s.* 8*d.* ob. clearly won in those six terms bought of the countess; then the whole commodity, from the first institution of this office, till the end of these last five years expired at the Annunciation 1595, shall appear to be

19887*l.* 9*s.* 9*d.* ob. qu. To the which sum also if 28550*l.* 15*s.* 6*d.* ob. qu. which the earl and the countess levied hereby, be likewise adjoined, then the whole profit taken in these nineteen years, that is, from the first lease, to the end of the last, for her majesty, the earl, and the countess, will amount unto 48438*l.* 5*s.* 4*d.* This labour hitherto thus luckily succeeding, the deputies in this office finding by daily proof, that it was wearisome to the subject to travel to divers places, and through sundry hands, for the pursuing of common recoveries, either not holden of her majesty at all, or but partly holden in chief; and not doubting to improve her majesty's revenue therein, and that without loss to any, either private person or public officer, if the same might be managed by them jointly with the rest whereof they had the charge; they found, by search in the hanaper, that the fruits of those writs of entry had not, one year with another, in the ten years next before, exceeded 400*l.* by the year. Whereupon they took hold of the occasion then present, for the renewing of the lease of the former profits; and moved the lord treasurer, and Sir John Fortescue, under-treasurer and chancellor of the exchequer, to join the same in one and the same demise, and to yield unto her majesty 500*l.* by year therefor; which is 100*l.* yearly of increase. The which desire being by them recommended to her majesty, it liked her forthwith to include the same, and all the former demised profits, within one intire lease, for seven years, to begin at the said feast of the Annunciation 1597, under the yearly rent of 2933*l.* 2*s.* 7*d.* qu. Since which time hitherto, I mean to the end of Michaelmas term 1598, not only the proportion of the said increased 100*l.* but almost of one other 100*l.* also, hath been answered to her majesty's coffers, for those recoveries so drawn into the demise now continuing.

Thus I have opened both the first plotting, the especial practice, and the consequent profit arising by these officers: and now if I should be demanded, whether this increase of profit were likely to stand without fall, or to be yet amended or made more? I would

answer, that if some few things were provided, and some others prevented, it is probable enough in mine opinion, that the profit should rather receive accession than decay.

The things that I wish to be provided are these: first, that by the diligence of these officers, assisted with such other as can bring good help thereunto, a general and careful collection be made of all the tenures in chief; and that the same be digested by way of alphabet into apt volumes, for every part, or shire, of the realm. Then that every office, or inquisition, that findeth any tenure in chief, shall express the true quantities of the lands so holden, even as in ancient time it was wont to be done by way of admeasurement, after the manner of a perfect extent or survey; whereby all the parts of the tenancy in chief may be wholly brought to light, howsoever in process of time it hath been, or shall be torn and dismembered. For prevention, I wish likewise, first, that some good means were devised for the restraint of making these inordinate and covenous leases of lands, holden in chief, for hundreds or thousands of years, now grown so bold, that they dare shew themselves in fines, levied upon the open stage of the common pleas; by which one man taketh the full profit, and another beareth the empty name of tenancy, to the infinite deceit of her majesty in this part of her prerogative. Then, that no alienation of lands holden in chief should be available, touching the freehold or inheritance thereof, but only where it were made by matter of record, to be found in some of her majesty's treasuries; and lastly, that a continual and watchful eye be had, as well upon these new founden traverses of tenure, which are not now tried *per patriam*, as the old manner was; as also upon all such pleas whereunto the confession of her majesty's said attorney general is expected: so as the tenure of the prerogative be not prejudiced, either by the fraud of counsellors at the law, many of which do bend their wits to the overthrow thereof; or by the greediness of clerks and attorneys, that, to serve their own gain, do both impair the tenure, and therewithal grow more

heavy to the client, in so costly pleading for discharge, than the very confession of the matter itself would prove unto him. I may yet hereunto add another thing, very meet not only to be prevented with all speed, but also to be punished with great severity: I mean that collusion set on foot lately, between some of her majesty's tenants in chief, and certain others that have had to do in her highness's grants of concealed lands: where, under a feigned concealment of the land itself, nothing else is sought but only to make a change of the tenure, which is reserved upon the grant of those concealments, into that tenure in chief: in which practice there is no less abuse of her majesty's great bounty, than loss and hindrance of her royal right. These things thus settled, the tenure in chief should be kept alive and nourished; the which, as it is the very root that doth maintain this silver stem, that by many rich and fruitful branches spreadeth itself into the chancery, exchequer, and court of wards; so, if it be suffered to starve, by want of ablaqueation, and other good husbandry, not only this yearly fruit will much decrease from time to time, but also the whole body and boughs of that precious tree itself will fall into danger of decay and dying.

And now, to conclude therewith, I cannot see how it may justly be misliked, that her majesty should, in a reasonable and moderate manner, demand and take this sort of finance: which is not newly out and imposed, but is given and grown up with the first law itself, and which is evermore accompanied with some special benefit to the giver of the same: seeing that lightly no alienation is made, but either upon recompence in money, or land, or for marriage, or other good and profitable consideration that doth move it: yea rather all good subjects and citizens ought not only to yield that gladly of themselves, but also to further it with other men; as knowing that the better this and such like ancient and settled revenues shall be answered and paid, the less need her majesty shall have to ask subsidies, fifteens, loans, and whatsoever extraordinary helps, that otherwise must of necessity be levied upon them. And for proof that it shall be more profitable

er majesty, to have every of the same to be manag-
y men of fidelity, that shall be waged by her own
, than either to be letten out to the fermours bene-
or to be left at large to the booty and spoil of ra-
ous ministers, that have not their reward; let the
eriment and success be in this one office, and per-
le for all the rest.

Laus Deo.

THE

LEARNED READING

OF

Mr. FRANCIS BACON,

ONE OF HER MAJESTY'S COUNCIL AT LAW,

UPON THE

STATUTE OF USES.

BEING

His double Reading to the Hon. SOCIETY OF GRAY'S I[illegible]N
42 Eliz.

I HAVE chosen to read upon the statute of uses made 27 Hen. VIII. a law, whereupon the inheritances of this realm are tossed at this day, like a ship upon the sea, in such sort, that it is hard to say which bark will sink, and which will get to the haven; that is to say, what assurances will stand good, and what will not. Neither is this any lack or default in the pilots, the grave and learned judges: but the tides and currents of received errors, and unwarranted and abusive experience have been so strong, as they were not able to keep a right course according to the law, so as this statute is in great part as a law made in the parliament, held 35 Reginæ; for in 37 Reginæ, by the notable judgment upon solemn arguments of all the judges assembled in the exchequer-chamber, in the famous cause between Dillon and Freine, concerning an assurance made by Chudleigh, this law began to be reduced to a true and sound exposition, and the false and perverted exposition, which had continued for so many years, though never countenanced by any rule or authority of weight, but only entertained in a popular conceit, and put in practice at adventure, grew to be controled; since which time, as it cometh to pass always upon the first reforming of inveterate errors, many doubts and perplexed questions have

risen, which are not yet resolved, nor the law thereupon settled: the consideration whereof moved me to take the occasion of performing this particular duty to the house, to see if I could, by my travel, bring the exposition thereof to a more general good of the commonwealth.

Herein, though I could not be ignorant of the difficulty of the matter, which he that taketh in hand shall soon find; or much less of my own inability, which I had continual sense and feeling of; yet because I had more means of absolution than the younger sort, and more leisure than the greater sort, I did think it not impossible to work some profitable effect; the rather because where an inferior wit is bent and conversant upon one subject, he shall many times with patience and meditation dissolve and undo many of the knots, which a greater wit, distracted with many matters, would rather cut in two than unknit: and at least, if my invention or judgment be too barren or too weak; yet, by the benefit of other arts, I did hope to dispose or digest the authorities or opinions which are in cases of uses in such order and method, as they should take light one from another, though they took no light from me. And like to the matter of my reading shall my manner be, for my meaning is to revive and recontinue the ancient form of reading, which you may see in Mr. Frowicke's upon the prerogative, and all other readings of ancient time, being of less ostentation, and more fruit than the manner lately accustomed: for the use then was, substantially to expound the statutes by grounds and diversities; as you shall find the readings still to run upon cases of like law and contrary law; whereof the one includes the learning of a ground, the other the learning of a difference: and not to stir concise and subtle doubts, or to contrive a multitude of tedious and intricate cases, whereof all, saving one, are buried, and the greater part of that one case, which is taken, is commonly nothing to the matter in hand; but my labour shall be in the ancient course, to open the law upon doubts, and not to open doubts upon this law.

EXPOSITIO STATUTI.

THE exposition of this statute consists, upon the matter without the statute: upon the matter within the statute.

Three things are to be considered concerning these statutes, and all other statutes, which are helps and inducements to the right understanding of any statute, and yet are no part of the statute itself.

1. The consideration of the statute at the common law.

2. The consideration of the mischief which the statute intendeth to redress, as also any other mischief, which an exposition of the statute this way or that way may breed.

3. Certain maxims of the common law, touching exposition of statutes.

Having therefore framed six divisions, according to the number of readings upon the statute itself, I have likewise divided the matter without the statute into six introductions or discourses, so that for every day's reading I have made a triple provision.

1. A preface or introduction.

2. A division upon the law itself.

3. A few brief cases, for exercise and argument.

The last of which I would have forborn: and, according to the ancient manner, you should have taken some of my points upon my divisions, one, two, or more, as you should have thought good; save that I had this regard, that the younger sort of the bar were not so conversant with matters upon the statutes; and for their ease I have interlaced some matters at the common law, that are more familiar within the books.

1. The first matter I will discourse unto you, is the nature and definition of an use, and its inception and progression before the statute.

2. The second discourse shall be of the second spring of this tree of uses since the statute.

3. The third discourse shall be of the estate of the assurances of this realm at this day upon uses, and

what kind of them is convenient and reasonable, and not fit to be touched, as far as the sense of law and natural construction of the statute will give leave; and what kind of them is convenient and meet to be suppressed.

4. The fourth discourse shall be of certain rules and expositions of laws applied to this present purpose.

5. The fifth discourse shall be of the best course to remedy the same inconveniencies now a-foot, by construction of the statute, without offering violence to the letter or sense.

6. The sixth and last discourse shall be of the best course to remedy the same inconveniencies, and to declare the law by act of parliament: which last I think good to reserve, and not to publish.

THE nature of a use is best discerned by considering what it is not, and then what it is; for it is the nature of all human science and knowledge to proceed most safely, by negatives and exclusives, to what is affirmative and inclusive:

First, an use is no right, title, or interest in law; and therefore master attorney, who read upon this statute, said well, that there are but two rights:

Jus in re: Jus ad rem.

The one is an estate, which is *Jus in re;* the other a demand, which is *Jus ad rem:* but a use is neither; so that in 24 H. VIII. it is said that the saving of the statute of 1 R. III. which saveth any right or interest of intails, must be understood of intails of the possession, and not of the part of the use, because a use is no right nor interest. So again, you see Littleton's conceit, that an use should amount to a tenancy at will, whereupon a release might well inure, because of privity, is controled by 4 and 5 H. VII. and divers other books, which say that *cestuy que use* is punishable in an action of trespass towards the feoffees; only 5 H. V. seemeth to be at some discord with other books, where it is admitted for law, that if there be *cestuy que use* of an advowson, and he be outlawed in a personal action, the King should have the present-

ment; which case Master Ewens, in the argument of Chudleigh's case, did seem to reconcile thus: where *cestuy que use*, being outlawed, had presented in his own name, there the King should remove his incumbent; but no such thing can be collected upon that book: and therefore I conceive the error grew upon this, that because it was generally thought, that a use was but a pernancy of profits; and then again because the law is, that, upon outlawries upon personal actions, the King shall have the pernancy of profits, they took that to be one and the self-same thing which *cestuy que use* had, and which the King was intitled unto; which was not so; for the King had remedy in law for his pernancy of profits, but *cestuy que use* had none. The books go further, and say, that a use is nothing, as in 2 H. VII. *det* was brought and counted *sur leas* for years rendring rent, *etc.* The defendant pleaded in bar, that the plaintiff *nihil habuit tempore dimissionis:* the plaintiff made a special replication, and shewed that he had an use, and issue joined upon that; wherefore it appeareth, that if he had taken issue upon the defendant's plea, it should have been found against him. So again in 4 Reginæ, in the case of the Lord Sandys, the truth of the case was a fine levied by *cestuy que use* before the statute, and this coming in question since the statute upon an averment by the plaintiff *quod partes finis nihil habuerunt*, it is said that the defendant may shew the special matter of the use, and it shall be no departure from the first pleading of the fine; and it is said farther that the averment given in 4 H. VII. *quod partes finis nihil habuerunt, nec in possessione, nec in usu,* was ousted upon this statute of 27 H. VIII. and was no more now to be accepted: but yet it appears, that if issue had been taken upon the general averment, without the special matter shewed, it should have been found for him that took the averment, because a use is nothing. But these books are not to be taken generally or grossly; for we see in the same books, when an use is specially alledged, the law taketh knowledge of it; but the sense of it is, that use is nothing for which remedy is given by the course of the common law, so as the law knoweth it,

but protects it not; and therefore when the question cometh, whether it hath any being in nature or conscience, the law accepteth of it; and therefore Littleton's case is good law, that he who hath but forty shillings free-hold in use, shall be sworn in an inquest, for it is ruled *secundum dominium naturale*, and not *secundum dominium legitimum, nam natura dominus est, quia fructum ex re percipit*. And some doubt if upon subsidies and taxes *cestuy que use* should be valued as an owner: so likewise if *cestuy que use* had released his use unto the feoffee for six pounds, or contracted with a stranger for the like sum, there is no doubt but it is a good condition or contract whereon to ground an action upon the case: for money for release of a suit in the chancery is a good *quid pro quo;* therefore to conclude, though a use be nothing in law to yield remedy by course of law, yet it is somewhat in reputation of law and conscience: for that may be somewhat in conscience which is nothing in law, like as that may be something in law which is nothing in conscience; as, if the feoffees had made a feoffment over in fee, *bona fide*, upon good consideration, and, upon a *subpœna* brought against them, they pleaded this matter in chancery, this had been nothing in conscience, not as to discharge them of damages.

A second negative fit to be understood is, that a use is no covin, nor is it a collusion, as the word is now used; for it is to be noted, that where a man doth remove the state and possession of land, or goods, out of himself unto another upon trust, it is either a special trust, or a general trust.

The special trust is either lawful or unlawful.

The special trust unlawful is, according to the case, provided for by ancient statutes of fermours of the profits; as where it is to defraud creditors, or to get men to maintain suits, or to defeat the tenancy to the *Præcipe*, or the statute of mortmain, or the lords of their wardships, or the like; and those are termed frauds, covins, or collusions.

The special trust lawful is, as when I infeoff some of my friends, because I am to go beyond the seas,

or because I would free the land from some statute, or bond, which I am to enter into, or upon intent to be reinfeoffed, or intent to be vouched, and so to suffer a common recovery, or upon intent that the feoffees shall infeoff over a stranger, and infinite the like intents and purposes, which fall out in mens dealings and occasions: and this we call confidence, and the books do call them intents; but where the trust is not special, nor transitory, but general and permanent, there it is a use; and therefore these three are to be distinguished, and not confounded; the covin, confidence, and use.

So as now we are come by negatives to the affirmative, what a use is, agreeable to the definition in Plowden, 352. Delamer's case, where it is said:

An use is a trust reposed by any person in the terretenant, that he may suffer him to take the profits, and that he will perform his intent.

But it is a shorter speech to say, that

Usus est dominium fiduciarium: Use is an owner's lifeship in trust.

So that *usus et status, sive possessio, potius differunt secundum rationem fori, quam secundum naturam rei,* for that one of them is in court of law, the other in court of conscience; and for a trust, which is the way to an use, it is exceeding well defined by a civilian of great understanding:

Fides est obligatio conscientiæ unius ad intentionem alterius.

And they have a good division likewise of rights:

Jus precarium: Jus fiduciarium: Jus legitimum.

1. A right in courtesy, for the which there is no remedy at all.
2. A right in trust, for which there is a remedy, but only in conscience.
3. A right in law.

So much of the nature and definition of an use.

It followeth to consider the parts and properties of an use: wherein by the consent of all books, as it was distinctly delivered by Justice Walmsley in 36 of Elizabeth: That a trust consisteth upon three parts.

The first, that the feoffee will suffer the feoffor to take the profits.

The second, that the feoffee upon request of the feoffor, or notice of his will, will execute the estates to the feoffor, or his heirs, or any other by his direction.

The third, that if the feoffee be disseised, and so the feoffor disturbed, the feoffee will re-enter, or bring an action to re-continue the possession; so that those three, pernancy of profits, execution of estates, and defence of the land, are the three points of trust.

The properties of an use are exceeding well set forth by Fenner, justice, in the same case; and they be three:

1. Uses, saith he, are created by confidence:

2. Preserved by privity, which is nothing else but a continuance of the confidence, without interruption: and

3. Ordered and guided by conscience: either by the private conscience of the feoffee; or the general conscience of the realm, which is chancery.

The two former of which, because they be matters more thoroughly beaten, and we shall have occasion hereafter to handle them, we will not now dilate upon:

But the third, we will speak somewhat of; both because it is a key to open many of the true reasons, and learnings of uses, and because it tendeth to decide our great and principal doubts at this day.

Coke solicitor, entring into his argument of Chudleigh's case, said sharply and fitly: "I will put never "a case but it shall be of an use, for a use in law "hath no fellow;" meaning, that the learning of uses is not to be matched with other learnings. Anderson, chief justice, in the argument of the same case, did truly and profoundly control the vulgar opinion collected upon 5 E. IV. that there might be *possessio fratris* of a use; for he said, that it was no more but that the chancellor would consult with the rules of

law, where the intention of the parties did not specially appear; and therefore the private conceit, which Glanvile, justice, cited in the 42 Reginæ, in the case of Corbet, in the common pleas, of one of Lincoln's Inn, whom he named not, but seemed to allow, is not sound; which was, that a use was but a limitation, and did ensue the nature of a possession.

This very conceit was set on foot in 27 H. VIII. in the Lord Darcie's case, in which time they began to heave at uses: for thereafter the realm had many ages together put in use the passage of uses by will, they began to argue that an use was not deviseable, but that it did ensue the nature of the land; and the same year after, this statute was made; so that this opinion seemeth ever to be a prelude and forerunner to an act of parliament touching uses; and if it be so meant now, I like it well: but in the mean time the opinion itself is to be rejected; and because, in the same case of Corbet, three reverend judges of the court of common pleas did deliver and publish their opinion, though not directly upon the point adjudged, yet *obiter* as one of the reasons of their judgment, that an use of inheritance could not be limited to cease; and again, that the limitation of a new use could not be to a stranger; ruling uses merely according to the ground of possession; it is worth the labour to examine that learning. By 3 Hen. VII. you may collect, that if the feoffees had been disseised by the common law, and an ancestor collateral of *cestuy que use* had released unto the disseisor, and his warranty had attached upon *cestuy que use;* yet the chancellor, upon this matter shewed, would have no respect unto it, to compel the feoffees to execute the estate unto the disseissor: for there the case being, that *cestuy que use* in tail having made an assurance by fine and recovery, and by warranty which descended upon his issue, two of the judges held, that the use is not extinct; and Bryan and Hussey, that held the contrary, said, that the common law is altered by the new statute; whereby they admit, that by the common law that warranty will not bind and extinct a right of a use, as it will do

right of possession; and the reason is, because the law of collateral warranty is a hard law, and not to be considered in a court of conscience. In 5 Edw. IV. it is said, that if *cestuy que use* be attainted, *query*, who shall have the land, for the lord shall not have the land; so as there the use doth not limitate the possession; and the reason is, because the lord hath a rent by title; for that is nothing to the *subpœna*, because the feoffee's intent was never to advance the lord, but only his own blood; and therefore the *query* of the book ariseth, what the trust and confidence of the feoffee did tye him to do, as whether he should not sell the land to the use of the feoffee's will, or *in pios usus?* So favourably they took the intent in those days, as you find in 27 Hen. VI. that if a man had appointed his use to one for life, the remainder in fee to another, and *cestuy que use* for life had refused, because the intent appeared not to advance the heir at all, nor him in reversion, presently the feoffee should have the estate for life of him that refused, some ways to the behoof of the feoffor. But to proceed in some better order towards the disproof of this opinion of limitation, there be four points wherein we will examine the nature of uses.

1. The raising of them.
2. The preserving of them.
3. The transferring of them.
4. The extinguishing of them.

1. In all these four, you shall see apparently that uses stand upon their own reasons, utterly differing from cases of possession. I would have one case shewed by men learned in the law, where there is a deed; and yet there needs a consideration; as for parole, the law adjudgeth it too light to give action without consideration; but a deed ever in law imports a consideration, because of the deliberation and ceremony in the confection of it: and therefore in 8 Reginæ it is solemnly argued, that a deed should raise an use without any other consideration. In the Queen's case a false consideration, if it be of record, will hurt the patent, but want of consideration doth

never hurt it; and yet they say that a use is but a nimble and light thing; and now, contrariwise, it seemeth to be weightier than any thing else: for you cannot weigh it up to raise it, neither by deed, nor deed inrolled, without the weight of a consideration; but you shall never find a reason of this to the world's end, in the law: But it is a reason of chancery, and it is this:

That no court of conscience will inforce *donum gratuitum*, though the intent appear never so clearly, where it is not executed, or sufficiently passed by law; but if money had been paid, and so a person damnified, or that it was for the establishment of his house, then it is a good matter in the chancery. So again I would see in the law, a case where a man shall take by a conveyance, be it by deed, livery, or word, that is not party to the grant: I do not say that the delivery must be to him that takes by the deed, for a deed may be delivery to one man to the use of another. Neither do I say that he must be party to the delivery of the deed, for he in the remainder may take though he be not party; but he must be party to the words of the grant; here again the case of the use goeth single, and the reason is, because a conveyance in use is nothing but a publication of the trust; and therefore so as the party trusted be declared, it is not material to whom the publication be. So much for the raising of uses. Now as to the preserving of them.

2. There is no case in the common law, wherein notice simply and nakedly is material to make a covin, or *particeps criminis;* and therefore if the heir which is in by descent, infeoff one which had notice of the disseisin, if he were not a *disseisor de facto,* it is nothing: so in 33 H. VI. if a feoffment be made upon collusion, and feoffee makes a feoffment over upon good consideration, the collusion is discharged, and it is not material if they had notice or no. So as it is put in 14 H. VIII. if a sale be made in a market overt upon good consideration, although it be to one that hath notice that they are stolen goods, yet the property of a stranger is bound; though in the book before

remembered 33 H. VI. some opine to the contrary, which is clearly no law; so in 31 E. III. if assets descend to the heir, and he alien it upon good consideration, although it be to one that had notice of the debt, or of the warranty, it is good enough. So 25 Ass. p. 1. if a man enter of purpose into my lands, to the end that a stranger which hath right, should bring his *præcipe* and evict the land, I may enter notwithstanding any such recovery; but if he enter, having notice that the stranger hath right, and the stranger likewise having notice of his entry, yet if it were not upon confederacy or collusion between them, it is nothing; and the reason of these cases is, because the common law looketh no farther than to see whether the act were merely *actus fictus in fraudem legis;* and therefore wheresoever it findeth consideration given, it dischargeth the covin.

But come now to the case of use, and there it is otherwise, as it is in 14 H. VIII. and 28 H. VIII. and divers other books; which prove that if the feoffee sell the land for good consideration to one that hath notice, the purchaser shall stand seised to the ancient use; and the reason is, because the chancery looketh farther than the common law, namely, to the corrupt conscience of him that will deal in the land, knowing it in equity to be another's; and therefore if there were *radix amaritudinis,* the consideration purgeth it not, but it is at the peril of him that giveth it: so that consideration, or no consideration, is an issue at the common law; but notice, or no notice, is an issue in the chancery. And so much for the preserving of uses.

3. For the transferring of uses there is no case in law whereby an action is transferred, but the *subpœna* in case of use was always assignable; nay farther, you find twice 27 H. VIII. fol. 10. pla. 9. and fol. 30. and pla. 21. that a right of use may be transferred: for in the former case Montague maketh the objection, and saith, that a right of use cannot be given by fine, but to him that hath the possession; Fitz-Herbert answereth, Yes, well enough; *query* the reason, saith the book.

And in the latter case, where *cestuy que use* was infeoffed by the disseisor of the feoffee, and made a feoffment over, Englefield doubted whether the second feoffee should have the use. Fitz-Herbert said, "I "marvel you will make a doubt of it, for there is no "doubt but the use passeth by the feoffment to the "stranger, and therefore this question needeth not to "have been made." So the great difficulty in 10 Reginæ, Delamer's case, where the case was in effect tenant in tail of an use, the remainder in fee; tenant in tail made a feoffment in fee; tenant, by the statute of 1 R. III. and the feoffee infeoffed him in the remainder of the use, who made it over; and there question being made, whether the second feoffee should have the use in remainder, it is said, that the second feoffee must needs have the best right in conscience; because the first feoffee claimed nothing but in trust, and the *cestuy que use* cannot claim it against his sale; but the reason is apparent, as was touched before, that a use in *esse* was but a thing in action, or in suit to be brought in court of conscience, and where the *subpœna* was to be brought against the feoffee, in possession to execute the estate, or against the feoffee out of possession to recontinue the estate, always the *subpœna* might be transferred; for still the action at the common law was not stirred but remained in the feoffee; and so no mischief of maintainance or transferring rights.

And if a use being but a right may be assigned, and passed over to a stranger, *a multo fortiori*, it may be limited to a stranger upon the privity of the first conveyance, as shall be handled in another place: and as to what Glanvile, justice, said, he could never find by any book, or evidence of antiquity, a contingent use limited over to a stranger; I answer, first, it is no marvel that you find no case before E. IV. his time, of contingent uses, where there be not six of uses in all; and the reason I doubt was, men did choose well whom they trusted, and trust was well observed: and at this day, in Ireland, where uses be in practice, cases of uses come seldom in question, except it be sometimes upon the alienations of tenants in tail by fine, that the

feoffees will not be brought to execute estates to the disinheritance of ancient blood. But for experience in the conveyance, there was nothing more usual in *obits*, than to will the use of the land to certain persons and their heirs, so long as they shall pay the chantry priests their wages, and in default of payment to limit the use over to other persons and their heirs; and so, in case of forfeiture, through many degrees; and such conveyances are as ancient as R. II. his time.

4. Now for determining and extinguishing of uses, I put the case of collateral warranty before, and to that the notable case of 14 H. VIII. Halfpenny's case, where this very point was as in the principal case; for a right out of land, and the land itself in case of possession, cannot stand together, but the rent shall be extinct; but there the case is, that the use of the land and the use of the rent shall stand well enough together; for a rent charge was granted by the feoffee to one, that had notice of the use, and ruled, that the rent was to the ancient use, and both uses were *in esse simul et semel:* and though Brudenell, chief justice, urged the ground of possession to be otherwise, yet he was over-ruled by the other three justices, and Brooke said unto him, he thought he argued much for his pleasure. And to conclude, we see that things may be avoided and determined by the ceremonies and acts, like unto those by which they are created and raised; that which passeth by livery ought to be avoided by entry; that which passeth by grant, by claim; that which passeth by way of charge, determineth by way of discharge: and so a use which is raised but by a declaration or limitation, may cease by words of declaration or limitation, as the civil law saith, *in his magis consentaneum est, quam ut iisdem modis res dissolvantur quibus constituantur.*

For the inception and progression of uses, I have for a precedent in them searched other laws, because states and commonwealths have common accidents; and I find in the civil law, that that which cometh nearest in name to the use, is nothing like in matter, which is *usus fructus:* for *usus fructus et dominium* is

with them, as with us particular tenancy and inheritance. But that which resembleth the use most is *fidei commissio*, and therefore you shall find in *Justinian, lib.* 2. that they had a form in testaments, to give inheritance to one to the use of another, *Hæredem constituo Caium; rogo autem te, Caie, ut hæreditatem restituas Seio.* And the text of the civilians saith, that for a great time if the heir did not as he was required, *cestuy que use* had no remedy at all, until about the time of Augustus Cæsar there grew in custom a flattering form of trust, for they penned it thus: *Rogo te per salutem Augusti*, or *per fortunam Augusti, etc.* Whereupon Augustus took the breach of trust to sound in derogation of himself, and made a rescript to the *prætor* to give remedy in such cases; whereupon within the space of a hundred years, these trusts did spring and speed so fast, as they were forced to have a particular chancellor only for uses, who was called *prætor fidei-commissarius;* and not long after, the inconvenience of them being found, they resorted unto a remedy much like unto this statute; for by two decrees of senate, called *senatus consultum Trebellianum et Pegasianum*, they made *cestuy que use* to be heir in substance. I have sought likewise, whether there be any thing which maketh with them in our law, and I find that Periam, chief baron, in the argument of Chudleigh's case, compareth them to copy-holders, and aptly for many respects.

Inst. 1. 2. Tit. 2.

First, because as an use seemeth to be an hereditament in the court of chancery, so the copy-hold seemeth to be an hereditament in the lord's court.

Secondly, this conceit of limitation hath been troublesome in copy-holders as well as in uses; for it hath been of late days questioned, whether there should be dowers, tenancies by the courtesy, intails, discontinuances, and recoveries of copy-holds, in the nature of inheritances, at the common law; and still the judgments have weighed, that you must have particular customs in copy-holds, as well as particular reasons of conscience in use, and the limitation rejected.

And thirdly, because they both grew to strength

and credit by degrees: for the copy-holder first had no remedy at all against the lord, and were as tenancy at will. Afterwards it grew to have remedy in chancery, and afterwards against their lords by trespass at the common law; and now, lastly, the law is taken by some, that they have remedy by *ejectione firmæ*, without a special custom of leasing. So no doubt in uses: at the first the chancery made question to give remedy, until uses grew more general, and the chancery more eminent; and then they grew to have remedy in conscience: but they could never obtain any manner of remedy at the common law, neither against the feoffee, nor against strangers; but the remedy against the feoffee was left to the *subpœna;* and the remedy against strangers to the feoffee.

Now for the cases whereupon uses were put in practice, Coke in his reading doth say well, that they were produced sometimes for fear, and many times for fraud. But I hold that neither of these cases were so much the reasons of uses, as another reason in the beginning, which was, that the lands by the common law of England were not testamentary or deviseable; and of late years, since the statute, the case of the conveyance for sparing of purchases and execution of estates; and now last of all an excess of evil in mens minds, affecting to have the assurance of their estate and possession to be revocable in their own times, and irrevocable after their own times.

Now for the commencement and proceeding of them, I have considered what it hath been in course of common law, and what it hath been in course of statute. For the common law the conceit of Shelley in 24 H. VIII. and of Pollard in 27 H. VIII. seemeth to me to be without ground, which was, that the use succeeded the tenure: for after that the statute of *Quia emptores terrarum*, which was made 18 E. I. had taken away the tenure between the feoffor and the feoffee, and left it to the lord paramount; they said that the feoffment being then merely without consideration, should therefore intend an use to the feoffor; which cannot be; for by that reason, if the feoffment

before the statute had been made *tenendum de capitalibus dominis*, as it must be, there should have been an use unto the feoffor before that statute. And again, if a grant had been made of such things as consist not in tenure, as advowsons, rents, villains, and the like, there should have been an use of them, wherein the law was quite contrary; for after the time that uses grew common, it was nevertheless a great doubt whether things that did lie in grant, did not carry a consideration in themselves because of the deed.

And therefore I do judge that the intendment of a use to the feoffor, where the feoffment was made without consideration, grew long after, when uses waxed general; and for this reason, because when feoffments were made, and that it rested doubtful whether it were in use or in purchase, because purchases were things notorious, and uses were things secret, the Chancellor thought it more convenient to put the purchaser to prove his consideration, than the feoffor and his heirs to prove the trust; and so made the intendment towards the use, and put the proof upon the purchaser.

And therefore as uses were at the common law in reason, for whatsoever is not by statute, nor against law, may be said to be at the common law; and both the general trust and the special, were things not prohibited by the law, though they were not remedied by the law; so the experience and practice of uses were not ancient; and my reasons why I think so are these:

First, I cannot find in any evidence before king R. II. his time, the clause *ad opus et usum*, and the very Latin of it savoureth of that time: for in ancient time, about Edw. I. his time, and before, when lawyers were part civilians, the Latin phrase was much purer, as you may see by Bracton's writing, and by ancient patents and deeds, and chiefly by the register of writs, which is good Latin; wherein this phrase, *ad opus et usum*, and the words, *ad opus*, is a barbarous phrase, and like enough to be the penning of some chaplain that was not much past his grammar, where he had found *opus et usus* coupled together, and

that they did govern an ablative case; as they do indeed since this statute, for they take away the land and put them into a conveyance.

Secondly, I find in no private act of attainder, the clause of forfeiture of lands, the words, "which he hath in possession or in use," until Ed. IV's reign.

Thirdly, I find the word "*use*" in no statute until 7 Rich. II. cap. 11. *Of provisors*, and in 15 Rich. *Of mortmain*.

Fourthly, I collect out of Choke's speech in 8 Ed. IV. where he saith, that by the advice of all the judges it was thought that the *subpœna* did not lie against the heir of the feoffee which was in by law, but *cestuy que use* was driven to his bill in parliament, that uses even in that time were but in their infancy; for no doubt but at the first the chancery made difficulty to give remedy at all, and did leave it to the particular conscience of the feoffee: but after the chancery grew absolute, as may appear by the statute of 13 H. VI. that complainants in chancery should enter into bond to prove their suggestions, which sheweth that the chancery at that time began to embrace too far, and was used for vexation; yet nevertheless it made scruple to give remedy against the heir being in by act in law, though he were privy: so that it cannot be that uses had been of any great continuance when they made that question; as for the case of *matrimonii prælocuti*, it hath no affinity with uses; for wheresoever there was remedy at the common law by action, it cannot be intended to be of the nature of a use.

And for the book commonly vouched of 8 *Ass.* where Earl calleth the possession of a conuzee upon a fine levied by consent and entry in *autre droit*, and 44 of E. III. where there is mention of the feoffors that sued by petition to the King, they be but implications of no moment. So as it appeareth the first practice of uses was about Richard II. his time; and the great multiplying and overspreading of them was partly during the wars in France, which drew most of the nobility to be absent from their possessions; and partly during the time of the trouble and civil war between the two houses about the title of the crown.

Now to conclude the progression of uses in course of statutes, I do denote three special points.

1. That a use had never any force at all at the common law, but by statute law.

2. That there was never any statute made directly for the benefit of *cestuy que use*, as that the descent of an use should toll an entry, or that a release should be good to the pernor of the profits, or the like; but always for the benefit of strangers and other persons against *cestuy que use*, and his feoffees: for though by the statute of Richard III. he might alter his feoffee, yet that was not the scope of the statute, but to make good his assurance to other persons, and the other came in *ex obliquo*.

3. That the special intent unlawful and covinous was the original of uses, though after it induced to the lawful intent general and special; for 30 Edw. III. is the first statute I find wherein mention is made of the taking of profits by one, where the estate in law is in another.

For as to the opinion in 27 Hen. VIII. that in case of the statute of Marlebridge, the feoffees took the profits, it is but a conceit: for the law is this day, that if a man infeoff his eldest son, within age, and without consideration, although the profits be taken to the use of the son, yet it is a feoffment within the statute. And for the statute *De religiosis* 7 Edward I. which prohibits generally that religious persons should not purchase *arte vel ingenio*, yet it maketh no mention of a use, but it saith *colore donationis, termini, vel alicujus tituli*, reciting there three forms of conveyances, the gift, the long lease, and feigned recovery; which gift cannot be understood of a gift to a stranger to their use, for that came to be holpen by 15 Richard II. long after.

But to proceed, in 5 Edward III. a statute was made for the relief of creditors against such as made covinous gifts of their lands and goods, and conveyed their bodies into sanctuaries, there living high upon other goods; and therefore that statute made their lands liable to their creditors executions in that particular case, if they took the profits. In 1 Richard II.

a statute was made for relief of those as had right of action, against those as had removed the tenancy of the *præcipe* from them sometimes by infeoffing great persons, for maintenance; and sometimes by secret feoffments to others, whereof the defendants could have no notice; and therefore the statute maketh the recovery good in all actions against the first feoffers as they took the profits, and so as the defendants bring their actions within a year of their expulsions. In 2 Richard II. *cap.* 3. *session* 2. an imperfection of the statute of 50 Edward III. was holpen; for whereas the statute took no place, but where the defendant appeared, and so was frustrated, the statute giveth upon proclamation made at the gate of the place privileged, that the land should be liable without appearance.

In 7 R. II. a statute was made for the restraint of aliens, to take any benefices, or dignities ecclesiastical, or farms, or administration to them, without the King's special licence, upon pain of the statute of provisors; which being remedied by a former statute, where the alien took it to his own use; it is by that statute remedied, where the alien took it to the use of another, as it is said in the book; though I guess, that if the record were searched, it should be, if any other purchased to the use of an alien, and that the words "or to the use of another," should be "or any other to his use." In 15 Rich. II. *cap.* 5. a statute was made for the relief of lords against mortmain, where feoffments were made to the use of corporations; and an ordinance made that for feoffments past the feoffees should, before a day, either purchase licence to amortise them, or alien them to some other use, or other feoffments to come, or they should be within the statute of mortmain. In 4 Hen. IV. *cap.* 7. the statute of 1 Richard II. is enlarged in the limitation of time; for whereas the statute did limit the action to be brought within the year of the feoffment, this statute in case of a disseisin extends the time to the life of the disseisor; and in all other actions, leaves it to the year from the time of the

action grown. In 11 Henry VI. *cap.* 3. that statute of 4 Henry IV. is declared, because the conceit was upon the statute, that in case of disseisin the limitation of the life of the disseisor went only to the assise of *novel disseisin*, and to no other action; and therefore that statute declareth the former law to extend to all other actions, grounded upon *novel disseisin*. In 11 Henry VI. *cap.* 5. a statute was made for relief of him in remainder against particular tenants, for lives, or years, that assigned over their estates, and took the profits, and then committed waste against them; therefore this statute giveth an action of waste, being pernors of the profits. In all this course of statutes no relief is given to purchasers, that come in by the party, but to such as come in by law, as defendants in *præcipes*, whether they be creditors, disseisors, or lessors, and that only in case of mortmain: and note also, that they be all in cases of special covinous intents, as to defeat executions, tenancy to the *præcipe*, and the statute of mortmain, or provisors. From 11 Henry VI. to 1 R. III. being the space of fifty years, there is a silence of uses in the statute book, which was at that time, when, no question, they were favoured most. In 1 Richard III. *cap.* 1. cometh the great statute for relief of those that come in by the party, and at that time an use appeareth in his likeness; for there is not a word spoken of taking the profits, to describe a use by, but of claiming to a use; and this statute ordained, that all gifts, feoffments, grants, *etc.* shall be good against the feoffors, donors and grantors, and all other persons claiming only to their use; so as here the purchaser was fully relieved, and *cestuy que use* was *obiter* enabled to change his feoffees; because there were no words in the statute of feoffments, grants, *etc.* upon good consideration; but generally in Henry VII.'s time, new statutes were made for further help and remedy to those that came in by act in law; as 1 Henry VII. *cap.* 1. a *formedon* is given without limitation of time against *cestuy que use*; and *obiter*, because they make him a tenant, they give him

advantage of a tenant, as of age, and voucher: *query* 4 Henry VII. *cap.* 17. the wardship is given to the lord of the heir of *cestuy que use*, dying and no will declared, is given to the lord, as if he had died seised in demesne, and action of waste given to the heir against the guardian, and damages, if the lord were barred in his writ of ward; and relief is likewise given unto the lord, if the heir holden the knight's service be of full age. In 19 Hen. VII. *cap.* 15. there is relief given in three cases, first to the creditors upon matters of record, as upon recognisance, statute, or judgment, whereof the two former were not aided at all by any statute: and the last was aided by a statute of 56 E. III. and 2 R. II. only in cases of sanctuary men. Secondly, to the lords in socage for their relief, and herriots upon death, which was omitted in the 4 Henry VII. and lastly to the lords of villains, upon a purchase of their villains in use. In 23 Henry VIII. *cap.* 10. a further remedy was given in a case like unto the case of mortmain; for in the statute of 15 Richard II. remedy was given where the use came *ad manum mortuam*, which was when it came to some corporation: now when uses were limited to a thing, act, or work, and to a body, as to the reparation of a church, or an abbot, or to a guild, or fraternities as are only in reputation, but not incorporated, as to parishes; or such guilds or fraternities as are only in reputation, but not incorporated, that case was omitted, which by this statute is remedied, not by way of giving entry unto the lord, but by way of making the use utterly void; neither doth the statute express to whose benefit the use shall be made void, either the feoffer, or feoffee, but leaveth it to law, and addeth a *proviso*, that uses may be limited twenty years from the gift, and no longer.

This is the whole course of statute law, before this statute, touching uses. Thus have I set forth unto you the nature and definition of an use, the differences and trust of an use, and the parts and qualities of it; and by what rules and learnings uses shall be guided and ordered: by a precedent of them in our laws, the

causes of the springing and spreading of uses, the continuance of them, and the proceedings that they have had both in common law and statute law; whereby it may appear, that a use is no more but a general trust when any one will trust the conscience of another better than his own estate and possession, which is an accident or event of human society, which hath been, and will be in all laws, and therefore was at the common law, which is common reason. Fitzherbert saith in the 14 H. VIII. common reason is common law, and not conscience; but common reason doth define that uses should be remedied in conscience, and not in courts of law, and ordered by rules in conscience, and not by straight rules of law; for the common law hath a kind of rule and survey over the chancery, to determine what belongs to the chancery. And therefore we may truly conclude, that the force and strength that a use had or hath in conscience, is by common law; and the force that it had or hath by common law, is only by statutes.

Now followeth in time and matter the consideration of this statute, which is of principal labour; for those former considerations which we have handled serve but for introduction.

This statute, as it is the statute which of all others hath the greatest power and operation over the heritages of the realm, so howsoever it hath been by the humour of the time perverted in exposition, yet in itself is most perfectly and exactly conceived and penned of any law in the book. 'Tis induced with the most declaring and persuading preamble, 'tis consisting and standing upon the wisest and fittest ordinances, and qualified with the most foreseeing and circumspect savings and provisoes; and lastly 'tis the best pondered in all the words and clauses of it of any statute that I find; but before I come to the statute itself, I will note unto you three matters of circumstance.

1. The time of the statute. 2. The title of it. 3. The precedent or pattern of it.

For the time of it was in 27 Hen. VIII. when the King was in full peace, and a wealthy and flourishing

estate, in which nature of time men are most careful of their possessions; as well because purchasers are most stirring, as again, because the purchaser when he is full, is no less careful of his assurance to his children, and of disposing that which he hath gotten, than he was of his bargain for the compassing thereof.

About that time the realm likewise began to be infranchised from the tributes of Rome, and the possessions that had been in mortmain began to stir abroad; for this year was the suppression of the smaller houses of religion, all tending to plenty, and purchasing: and this statute came in consort with divers excellent statutes, made for the kingdom in the same parliament; as the reduction of Wales to a more civil government, the re-edifying of divers cities and towns, the suppressing of depopulation and inclosures.

For the title, it hath one title in the roll, and another in course of pleading. The title in the roll is no solemn title, but an act intitled, An act expressing an order for uses and wills; the title in course of pleading is, *Statutum de usibus in possessionem transferendis:* wherein Walmsly justice noted well 40 *Reginæ*, that if a man look to the working of the statute, he would think that it should be turned the other way, *de possessionibus ad usus transferendis;* for that is the course of the statute, to bring possession to the use. But the title is framed not according to the work of the statute, but according to the scope and intention of the statute, *nam quod primum est in intentione ultimum est in operatione.* The intention of the statute by carrying the possession to the use, is to turn the use to a possession; for the words are not *de possessionibus ad usus transferendis;* and as the grammarian saith, *præpositio,* ad, *denotat notam actionis, sed præpositio,* in, *cum accusativo denotat notam alterationis:* and therefore Kingsmill justice in the same case saith, that the meaning of the statute was to make a transubstantiation of the use into a possession. But it is to be noted, that titles of acts of parliament severally came in but in the 5 Hen. VIII. for before that time there was but one title of all the acts made in one parliament; and

that was no title neither, but a general preface of the good intent of the King, tho' now it is parcel of the record.

For the precedent of this statute upon which it is drawn, I do find by the first Richard III. whereupon you may see the very mould whereon this statute was made, that the said King having been infeoffed, before he usurped, to uses, it was ordained that the land whereof he was jointly infeoffed should be as if he had not been named; and where he was solely infeoffed, it should be in *cestuy que use*, in estate, as he had the use.

Now to come to the statute itself, the statute consisteth, as other laws do, upon a preamble, the body of the law, and certain savings, and provisoes. The preamble setteth forth the inconveniencies, the body of the law giveth the remedy, and the savings and provisoes take away the inconveniencies of the remedy. For new laws are like the apothecaries drugs, though they remedy the disease, yet they trouble the body; and therefore they use to correct with spices: so it is not possible to find a remedy for any mischief in the commonwealth, but it will beget some new mischief; and therefore they spice their laws with provisoes to correct and qualify them.

The preamble of the law was justly commended by Popham chief justice in 36 *Reginæ*, where he saith, that there is little need to search and collect out of cases, before this statute what the mischief was which the scope of the statute, was to redress; because there is a shorter way offered us, by the sufficiency and fulness of the preamble, and therefore it is good to consider it and ponder it thoroughly.

The preamble hath three parts.

First, a recital of the principal inconveniencies, which is the root of all the rest.

Secondly, an enumeration of divers particular inconveniencies, as branches of the former.

Thirdly, a taste or brief note of the remedy that the statute meaneth to apply. The principal inconvenience, which is *radix omnium malorum*, is the diverting

from the grounds and principles of the common law, by inventing a mean to transfer lands and inheritances without any solemnity or act notorious; so as the whole statute is to be expounded strongly towards the extinguishment of all conveyances, whereby the freehold or inheritance may pass without any new confections of deeds, executions of estate or entries, except it be where the estate is of privity and dependence one towards the other; in which cases, *mutatis mutandis*, they might pass by the rules of the common law.

The particular inconveniencies by the law rehearsed may be reduced into four heads.

1. First, that these conveyances in use are weak for consideration.

2. Secondly, that they are obscure and doubtful for trial.

3. Thirdly, that they are dangerous for want of notice and publication.

4. Fourthly, that they are exempted from all such titles as the law subjecteth possessions unto.

The first inconvenience lighteth upon heirs.

The second upon jurors and witnesses.

The third upon purchasers.

The fourth upon such as come in by gift in law.

All which are persons that the law doth principally respect and favour.

For the first of these are three impediments to the judgment of man, in disposing justly and advisedly of his estate.

First, trouble of mind.

Secondly, want of time.

Thirdly, of wise and faithful counsel about him.

1. And all these three the statute did find to be in the disposition of an use by will, whereof followed the unjust disinherison of heirs. Now the favour of law unto heirs appeareth in many parts of the law; as the law of descent privilegeth the possession of the heir against the entry of him that hath right by the law; no man shall warrant against his heir, except he warrant against himself, and divers other cases too long to stand upon: and we see the ancient law in Glanvill's

time was, that the ancestor could not disinherit his heir by grant, or other act executed in time of sickness; neither could he alien land which had descended unto him, except it were for consideration of money or service; but not to advance any younger brother without the consent of the heir.

2. For trials, no law ever took a straiter course that evidence should not be perplexed, nor juries inveigled, than the common law of England; as on the other side, never law took a more precise and strait course with juries, that they should give a direct verdict. For whereas in a manner all laws do give the triers, or jurors, which in other laws are called judges *de facto*, a liberty to give *non liquet*, that is, to give no verdict at all, and so the case to stand abated; our law inforceth them to a direct verdict, general or special; and whereas other laws accept of plurality of voices to make a verdict, our law inforceth them all to agree in one; and whereas other laws leave them to their own time and ease, and to part, and to meet again; our law doth duress and imprison them in the hardest manner, without light or comfort, until they be agreed, in consideration of straitness and coercion; it is consonant, that the law do require in all matters brought to issue, that there be full proof and evidence; and therefore if the matter in itself be of that surety as in simple contracts, which are made by parole without writing, it alloweth wager of law.

In issue upon the mere right, which is a thing hardly to discern, it alloweth wager of battail to spare jurors, if time have wore out the marks and badges of truth: from time to time there have been statutes of limitation, where you shall find this mischief of perjuries often recited; and lastly, which is the matter in hand, all inheritances could not pass but by acts overt and notorious, as by deeds, livery, and records.

3. For purchasers, *bona fide*, it may appear that they were ever favoured in our law, as first by the great favour of warranties which were ever for the help of purchasers: as where by the law in Edw. III.'s time, the disseisee could not enter upon the feoffee in

regard of the warranty; so again the collateral garranty, which otherwise as a hard law, grew in doubt only upon favour of purchasers; so was the binding of fines at the common law, the invention and practice of recoveries, to defeat the statute of entails, and many more grounds and learnings are to be found, which respect to the quiet of the possession of purchasers. And therefore though the statute of 1 Rich. III. had provided for the purchaser in some sort, by enabling the acts and conveyances of *cestuy que use;* yet nevertheless, the statute did not at all disable the acts or charges of the feoffees: and so as Walmsly justice said 42 *Reginæ*, they played at double hand, for *cestuy que use* might sell, and the feoffee might sell, which was a very great uncertainty to the purchaser.

4. For the fourth inconvenience towards those that come in by law; conveyances in uses were like privileged places or liberties: for as there the law doth not run, so upon such conveyances the law could take no hold, but they were exempted from all titles in law. No man is so absolute owner of his possessions, but that the wisdom of the law doth reserve certain titles unto others; and such persons come not in by the pleasure and disposition of the party, but by the justice and consideration of law, and therefore of all others they are most favoured: and also they are principally three.

1. The King and lords, who lost the benefit of attainders, fines for alienations, escheats, aids, herriots, reliefs, &c.

2. The defendants in *præcipes* either real or personal, for debt and damages, who lost the benefit of their recoveries and executions.

3. Tenants in dower, and by the courtesy, who lost their estates and tithes.

1. First for the King: no law doth endow the King or sovereign with more prerogatives or privileges: for his person is privileged from suits and actions, his possessions from interruption and disturbance, his right from limitation of time, his patents and gifts from all deceits and false suggestions. Next the King is the

lord, whose duties and rights the law doth much favour, because the law supposeth the land did originally come from him; for until the statute of *Quia emptores terrarum*, the lord was not forced to destruct or dismember his signiory or service. So until 15 H. VII. the law was taken, that the lord, upon his title of wardship, should put out a conuzee of a statute, or a termor; so again we see, that the statute of mortmain was made to preserve the lord's escheats and wards: the tenant in dower is so much favoured, as that it is the common by-word in the law, that the law favoureth three things.

1. Life. 2. Liberty. 3. Dower.

So in case of voucher, the feme shall not be delayed, but shall recover against the heir incontinent; so likewise of tenant by courtesy it is called tenancy by the law of England, and therefore specially favoured, as a proper conceit and invention of our law; so as again the law doth favour such as have ancient rights, and therefore it telleth us it is commonly said that a right cannot die: and that ground of law, that a freehold cannot be in suspense, sheweth it well, insomuch that the law will rather give the land to the first comer, which we call an occupant, than want a tenant to a demandant's action.

And again the other ancient ground of law of *remitter*, sheweth that where the tenant faileth without folly in the defendant, the law executeth the ancient right. To conclude therefore this point, when this practice of feoffments to use did prejudice and damnify all those persons that the ancient common law favoured; and did absolutely cross the wisdom of the law: to have conveyances considerate and not odious, and to have trial thereupon clear and not inveigled, it is no marvel that the statute concludeth, that their subtle imaginations and abuses tended to the utter subversion of the ancient common laws of this realm.

The third part of the preamble giveth a touch of the remedy which the statute intendeth to minister, consisting in two parts.

First, the expiration of feoffments.

Secondly, the taking away of the hurt, damage, and deceit of the uses; out of which have been gathered two extremities of opinions.

The first opinion is, that the intention of the statute was to discontinue and banish all conveyances in use; grounding themselves upon the words, that the statute doth not speak of the extinguishment or extirpation of the use, namely, by an unity of possession, but of an extinguishment or extirpation of the feoffment, &c. which is the conveyance itself.

Secondly, out of the words, abuse and errors, heretofore used and accustomed, as if uses had not been at the common law, but had been only an erroneous device or practice. To both which I answer.

To the former, that the extirpation which the statute meant was plain, to be of the feoffee's estate, and not to the form of conveyances.

To the latter I say, that for the word, abuse, that may be an abuse of the law, which is not against law, as the taking long leases at this day of land *in capite* to defraud wardships, is an abuse of the law, which is not against law, but wandering or going astray, or digressing from the ancient practice of the law; and by the word, errors, the statute meant by it, not a mistaking of the law, into a by-course: as when we say, *erravimus cum patribus juris*, it is not meant of ignorance only, but of perversity. But to prove that the statute meant not to suppress the form of conveyances, there be three reasons which are not answerable.

The first is, that the statute in the very branch thereof hath words *de futuro*, that are seised, or hereafter shall be seised: and whereas it may be said that these words were put in, in regard of uses suspended by disseisins, and so no present seisin to the use, until a regress of the feoffees; that intendment is very particular, for commonly such cases are brought in by provisoes, or special branches, and not intermixed in the body of a statute; and it had been easy for the statute to have said, "or hereafter shall be seised upon "any feoffment, *etc.* heretofore had or made."

The second reason is upon the words of the statute of inrolments, which saith, that no hereditaments shall pass, *etc.* or any use thereof, *etc.* whereby it is manifest, that the statute meant to leave the form of conveyance with the addition of a farther ceremony.

The third reason I make is out of the words of the proviso, where it is said, that no primer seisin, livery, no fine, nor alienation, shall be taken for any estate executed by force of the statute of 27, before the first of May, 1536, but they shall be paid for uses made and executed in possession for the time after; where the word, made, directly goeth to conveyances in use made after the statute, and can have no other understanding; for the words, executed in possession, would have served for the case of regress: and lastly, which is more than all, if they have had any such intent, the case being so general and so plain, they would have had words express, that every limitation of use made after the statute should have been void; and this was the exposition, as tradition goeth, that a reader of Gray's-Inn, which read soon after the statute, was in trouble for, and worthily, who, as I suppose, was Boy, whose reading I could never see; but I do now insist upon it, because now again some, in an immoderate invective against uses, do relapse to the same opinion.

The second opinion, which I called a contrary extremity, is, that the statute meant only to remedy the mischiefs in the preamble, recited as they grew by reason of divided uses; and although the like mischief may grow upon the contingent uses, yet the statute had no foresight of them at that time, and so it was merely a new case not comprised. Whereunto I answer, that it is the work of the statute to execute the divided use; and therefore to make an use void by this statute which was good before, though it doth participate of the mischief recited in the statute, were to make a law upon a preamble without a purview, which were grossly absurd. But upon the question what uses are executed, and what not; and whether out of possessions of a disseisor, or other possessions out of privity or not, there you shall guide your exposition according

to the preamble; as shall be handled in my next day's discourse, and so much touching the preamble of this law.

For the body of the law, I would wish all readers that expound statutes to do as scholars are willed to do: that is, first to seek out the principal verb; that is, to note and single out the material words whereupon the statute is framed; for there are in every statute certain words, which are as veins where the life and blood of the statute cometh, and where all doubts do arise, and the rest are *literæ mortuæ*, fulfilling words.

The body of the statute consisteth upon two parts.

First, a supposition or case put, as Anderson 36 *Reginæ* calleth it.

Secondly, a purview or ordinance thereupon.

The cases of the statute are three, and every one hath his purview. The general case. The case of co-feoffees to the use of some of them. And the general case of feoffees to the use or pernors of rents or profits.

The general case is built upon eight material words. Four on the part of the feoffees. Three on the part of *cestuy que use*. And one common to them both.

The first material word on the part of the feoffees is the word, person. This excludes all alliances; for there can be no trust reposed but in a person certain: it excludes again all corporations; for they are equalled to a use certain: for note on the part of the feoffer-over the statute insists upon the word, person, and on the part of *cestuy que use*, that added body politic.

The second word material, is the word, seised: this excludes chattels. The reason is, that the statute meant to remit the common law, and not but that the chattels might ever pass by testament or by parole; therefore the use did not pervert them. It excludes rights, for it is against the rules of the common law to grant or transfer rights; and therefore the statute would execute them. Thirdly, it excludes contingent uses, because the seisin cannot be but to a fee-simple of a use; and when that is limited, the seisin of the feoffee is spent; for Littleton tells us, that there are but two seisins, one *in dominio ut de feodo*, the other *ut de feodo*

et jure; and the feoffee by the common law could execute but the fee-simple to uses present, and not post uses; and therefore the statute meant not to execute them.

The third material word is, hereafter: that bringeth in again conveyances made after the statute; it brings in again conveyances made before, and disturbed by disseisin, and recontinued after; for it is not said, infeoffed to use hereafter seised.

The fourth word is, hereditament, which is to be understood of those things whereof an inheritance is in *esse:* for if I grant a rent charge *de novo* for life to a use, this is good enough; yet there is no inheritance in being of this rent: this word likewise excludes annuities and uses themselves; so that a use cannot be to a use.

The first word on the part of *cestuy que use*, is the word, use, confidence, or trust, whereby it is plain that the statute meant to remedy the matter, and not words; and in all the clauses it still carrieth the words.

The second word is the word, person, again, which excludeth all alliances; it excludeth also all contingent uses which are not to bodies lively and natural, as the building of a church, the making of a bridge; but here, as noted before, it is ever coupled with body politic.

The third word is the word, other; for the statute meant not to cross the common law. Now at this time uses were grown to such a familiarity, as men could not think of possession, but in course of use; and so every man was seised to his own use, as well as to the use of others; therefore because statutes would not stir nor turmoil possessions settled at the common law, it putteth in precisely this word, other; meaning the divided use, and not the conjoined use; and this causeth the clause of joint feoffees to follow in a branch by itself; for else that case had been doubtful upon this word, other.

The words that are common to both, are words expressing the conveyance whereby the use ariseth, of

which words, those that breed any question are, agreement, will, otherwise, whereby some have inferred that uses might be raised by agreement parole, so there were a consideration of money or other matter valuable; for it is expressed in the words before, bargain, sale, and contract, but of blood, or kindred; the error of which collection appeareth in the word immediately following, namely, will, whereby they might as well include, that a man seised of land might raise an use by will, especially to any of his sons or kindred, where there is a real consideration; and by that reason, mean, betwixt this statute and the statute of 32 of wills, lands were deviseable, especially to any man's kindred, which was clearly otherwise; and therefore those words were put in, not in regard of uses raised by those conveyances, or without, or likewise by will, might be transferred; and there was a person seized to a use, by force of that agreement or will, namely, to the use of the assignee; and for the word, otherwise, it should by the generality of the word include a disseisin, to a use. But the whole scope of the statute crosseth that which was to execute such uses, as were confidences and trust, which could not be in case of disseisin; for if there were a commandment precedent, then the land was vested in *cestuy que use* upon the entry; and if the disseisin were of the disseisor's own head, then no trust. And thus much for the case of supposition of this statute: here follow the ordinance and purview thereupon.

The purview hath two parts, the first *operatio statuti*, the effect that the statute worketh: and there is *modus operandi*, a fiction, or explanation how the statute doth work that effect. The effect is, that *cestuy que use* shall be in possession of like estate as he hath in the use; the fiction *quomodo* is, that the statute will have the possession of *cestuy que use*, as a new body compounded of matter and form; and that the feoffees shall give matter and substance, and the use shall give form and quality. The material words in the first part of the purview are four.

The first words are, remainder and reverter, the

statute having spoken before of uses in fee-simple, in tail, for life, or years, addeth, or otherwise in remainder or reverter: whereby it is manifest, that the first words are to be understood of uses in possession. For there are two substantial and essential differences of estates, the one limiting the times, for all estates are but times of their continuances; this maketh the difference of fee-simple, fee-tail, for life or years; and the other maketh difference of possession as remainder: all other differences of estate are but accidents, as shall be said hereafter: these two the statute meant to take hold of, and at the words, remainder and reverter, it stops: it adds not words, right, title or possibility, nor it hath not general words, or otherwise: it is most plain, that the statute meant to execute no inferior uses to remainder or reverter: that is to say, no possibility or contingencies, but estates, only such as the feoffees might have executed by conveyance made. Note also, that the very letter of the statute doth take notice of a difference between an use in remainder and an use in reverter; which though it cannot be properly so called, because it doth not depend upon particular estates, as remainders do, neither did then before the statute draw any tenures as reversions do; yet the statute intends that there is a difference when the particular use, and the use limited upon the particular use, are both new uses; in which case it is a use in remainder; and where the particular use is a new use, and the remnant of the use is the old use, in which case it is a use in reverter.

The next material word is, from henceforth, which doth exclude all conceit of relation that *cestuy que use* shall not come in: as from the time of the first feoffments to use, as Brudnell's conceit was in 14 Hen. VIII. That is, the feoffer had granted a rent charge, and *cestuy que use* had made a feoffment in fee, by the statute of 1 Richard III. the feoffer should have held it discharged, because the act of *cestuy que use* shall put the feoffer in, as if *cestuy que use* had been seised in from the time of the first use limited; and therefore the statute doth take away all such ambi-

guities, and expresseth that *cestuy que use* shall be in possession from henceforth; that is, from the time of the parliament for uses then in being, and from the time of the execution for uses limited after the parliament.

The third material words are, lawful seisin, state, and possession, not a possession in law only, but a seisin in fact; not a title to enter into the land, but an actual estate.

The fourth words are, of and in such estates as they had in the use; that is to say, like estates, fee-simple, fee-tail, for life, for years at will, in possession, and reversion, which are the substantial differences of estates, as was said before; but both these latter clauses are more fully perfected and expounded by the branch of the fiction of the statute which follows.

This branch of fiction hath three material words or clauses: the first material clause is, that the estate, right, title, and possession that was in such person, *etc.* shall be in *cestuy que use;* for that the matter and substance of the estate of *cestuy que use* is the estate of the feoffee, and more he cannot have; so as if the use were limited to *cestuy que use* and his heirs, and the estate out of which it was limited was but an estate for life, *cestuy que use* can have no inheritance: so if when the statute came, the heir of the feoffee had not entred after the death of his ancestor, but had only a possession in law, *cestuy que use* in that case should not bring an assize before entry, because the heir of the feoffee could not; so that the matter whereupon the use must work is the feoffee's estate. But note here: whereas before when the statute speaks of the uses, it spake only of uses in possession, remainder and reverter, but not in title or right: now when the statute speaks what shall be taken from the feoffee, it speaks of title and right: so that the statute takes more from the feoffee than it executes presently, in case where there are uses in contingence which are but titles.

The second word is, clearly, which seems properly and directly to meet with the conceit of *scintilla juris,* as well as the words in the preamble of extirpating

and extinguishing such feoffments, so is their estate as clearly extinct.

The third material clause is, after such quality, manners, form, and condition as they had in the use, so as now as the feoffee's estate gives matter, so the use gives form: and as in the first clause the use was endowed with the possession in points of estate, so there it is endowed with the possession in all accidents and circumstances of estate. Wherein first note, that it is gross and absurd to expound the form of the use any whit to destroy the substance of the estate; as to make a doubt, because the use gave no dower or tenancy by the courtesy, that therefore the possession when it is transferred would do so likewise: no, but the statute meant such quality, manner, form and condition, as it is not repugnant to the corporal presence and possession of the estate.

Next for the word, condition, I do not hold it to be put in for uses upon condition, though it be also comprised within the general words; but because I would have things stood upon learnedly, and according to the true sense, I hold it but for an explaining, or word of the effect; as it is in the statute of 26 of treasons, where it is said, that the offenders shall be attainted of the over fact by men of their condition, in this place, that is to say, of their degree or sort: and so the word condition in this place is no more, but in like quality, manner, form and degree, or sort; so as all these words amount but to *modo et forma.* Hence therefore all circumstances of estate are comprehended as sole seisin, or jointly seisin, by intierties, or by moieties, a circumstance of estate to have age as coming in by descent, or not age as purchaser; or circumstance of estate descendable to the heir of the part of the father, or of the part of the mother; a circumstance of estate conditional or absolute, remitted or not remitted, with a condition of inter-marriage or without: all these are accidents and circumstances of estate, in all which the possession shall ensue the nature and quality of the use: and thus much of the first case, which is the general case.

The second case of the joint feoffees needs no ex-

position; for it pursueth the penning of the general case: only this I will note, that although it had been omitted, yet the law upon the first case would have been taken as the case provided: so that it is rather an explanation than an addition; for turn that case the other way, that one were infeoffed to the use of himself, I hold the law to be, that in the former case they shall be seised jointly; and so in the latter case *cestuy que use* shall be seised solely; for the word, other, it shall be qualified by the construction of cases, as shall appear when I come to my division. But because this case of co-feoffees to the use of one of them was a general case in the realm, therefore they foresaw it expressed it precisely, and passed over the case *e converso*, which was but an especial case: and they were loth to bring in this case, by inserting the word, only, into the first case, to have penned it to the use only of other persons: for they had experience what doubt the word, only, bred upon the statute of 1 R. III. after this third case: and before the third case of rents comes in the second saving; and the reason of it is worth the noting, why the savings are interlaced before the third case; the reason of it is, because the third case needeth no saving, and the first two cases did need savings; and that is the reason of that again.

It is a general ground, that where an act of parliament is donor, if it be penned with an *ac si*, it is not a saving, for it is a special gift, and not a general gift, which includes all rights; and therefore in 11 Henry VII. where upon the alienation of women, the statute intitles the heir of him in remainder to enter, you find never a stranger, because the statute gives entry not *simpliciter*, but within an *ac si;* as if no alienation had been made, or if the feme had been naturally dead. Strangers that had right might have entred; and therefore no saving needs. So in the statute of 32 of leases, the statute enacts, that the leases shall be good and effectual in law, as if the lessor had been seised of a good and perfect estate in fee-simple; and therefore you find no saving in the statute; and so likewise of diverse other statutes, where the statute doth make a

gift or title good specially against certain persons, there needs no saving, except it be to exempt some of those persons, as in the statute of 1 R. III. Now to apply this to the case of rents, which is penned with an *ac si*, namely, as if a sufficient grant or lawful conveyance had been made, or executed by such as were seised; why if such a grant of a rent had been made, one that had an ancient right might have entred and have avoided the charge; and therefore no saving needeth: but the second first cases are not penned with an *ac si*, but absolute, that *cestuy que use* shall be adjudged in estate and possession, which is a judgment of parliament stronger than any fine, to bind all rights; nay, it hath farther words, namely, in lawful estate and possession, which maketh it stronger than any in the first clause. For if the words only had stood upon the second clause, namely, that the estate of the feoffee should be in *cestuy que use*, then perhaps the gift should have been special, and so the saving superfluous: and this note is material in regard of the great question, whether the feoffees may make any regress; which opinion, I mean, that no regress is left unto them, is principally to be argued out of the saving; as shall be now declared: for the savings are two in number: the first saveth all strangers rights, with an exception of the feoffees; the second is a saving out of the exception of the first saving, namely, of the feoffees in case where they claim to their own proper use: it had been easy in the first saving out of the statute, other than such persons as are seised, or hereafter should be seised to any use, to have added to these words, executed by this statute; or in the second saving to have added unto the words, claiming to their proper use, these words, or to the use of any other, and executed by this statute: but the regress of the feoffee is shut out between the two savings; for it is the right of a person claiming to an use, and not unto his own proper use; but it is to be added, that the first saving is not to be understood as the letter implieth, that feoffees to use shall be barred of their regress, in case that it be of another feoffment than that whereupon the statute hath wrought, but upon

the same feoffment; as if the feoffee before the statute had been disseised, and the disseised had made a feoffment in fee to I. D. his use, and then the statute came; this executeth the use of the second feoffment; but the first feoffees may make a regress, and they yet claim to an use, but not by that feoffment upon which the statute hath wrought.

Now followeth the third case of the statute, touching execution of rents; wherein the material words are four:

First, whereas diverse persons are seised, which hath bred a doubt that it should only go to rents in use at the time of the statute; but it is explained in the clause following, namely, as if a grant had been made to them by such as are or shall be seised.

The second word is, profit; for in the putting of the case, the statute speaketh of a rent; but after in the purview is added these words, or profit.

The third word is *ac si, scilicet*, that they shall have the rent as if a sufficient grant or lawful conveyance had been made and executed unto them.

The fourth words are the words of liberty and remedies attending upon such rent, *scilicet*, that he shall distrain, *etc.* and have such suits, entries, and remedies, relying again with an *ac si*, as if the grant had been made with such collateral penalties and advantages.

Now for the provisoes; the makers of this law did so abound with policy and discerning, as they did not only foresee such mischiefs as were incident to this new law immediately, but likewise such as were consequent in a remote degree; and therefore besides the express provisoes, they did add three new provisoes which are in themselves substractive laws: for foreseeing that by the execution of uses, wills formerly made should be overthrown; they made an ordinance for wills. Foreseeing likewise, that by execution of uses women should be doubly advanced; they made an ordinance for dowers and jointures. Foreseeing again, that the execution of uses would make *frank-*

tenement pass by contracts parole, they made an ordinance for inrolments of bargains and sales. The two former they inserted into this law, and the third they distinguished into a law apart, but without any preamble as may appear, being but a proviso to this statute. Besides all these provisional laws; and besides four provisoes, whereof three attend upon the law of jointure, and one of persons born in Wales, which are not material to the purpose in hand; there are six provisoes which are natural and true members and limbs of the statute, whereof four concern the part of *cestuy que use*, and two concern the part of the feoffees. The four which concern the part of *cestuy que use*, tend all to save him from prejudice by the execution of the estate.

The first saveth him from the extinguishment of any statute or recognisance, as if a man had an extent of a hundred acres, and an use of the inheritance of one. Now the statute executing the possession to that one, would have extinguished his extent being intire in all the rest: or as if the conuzee of a statute having ten acres liable to the statute, had made a feoffment in fee to a stranger of two, and after had made a feoffment in fee to the use of the conuzee and his heirs. And upon this proviso there arise three questions:

First, whether this proviso were not superfluous, in regard that *cestuy que use* was comprehended in the general saving, though the feoffees be excluded?

Secondly, whether this proviso doth save statutes executions, with an apportionment, or intire?

Thirdly, because it is penned indefinitely in point of time, whether it shall go to uses limited after the statute, as well as to those that were in being all the time of the statute; which doubt is rather inforced by this reason, because there was for * uses at the time of the statute; for that the execution of the statute might be waved: but both possession and use, since the statute, may be waved.

The second proviso saveth *cestuy que use* from the

* The text here is manifestly corrupted, nor does any probable conjecture occur for its amendment.

charge of *primer seisin, liveries, ouster les maines,* and such other duties to the King, with an express limitation of time, that he shall be discharged for the time past, and charged for the time to come to the King, namely, May 1536, to be *communis terminus.*

The third proviso doth the like for fines, reliefs, and herriots, discharging them for the time past, and speaking nothing of the time to come.

The fourth proviso giveth to *cestuy que use* all collateral benefits or vouchers, aid-priers, actions of waste, trespass, conditions broken, and which the feoffees might have had; and this is expressly limited for estates executed before 1 May 1536. And this proviso giveth occasion to intend that none of these benefits would have been carried to *cestuy que use,* by the general words in the body of the law, *scilicet,* that the feoffees estate, right, title, and possession, *etc.*

For the two provisoes on the part of the tertenant, they both concern the saving of strangers from prejudice, *etc.*

The first saves actions depending against the feoffees, that they shall not abate.

The second saves wardships, liveries, and *ouster les maines,* whereof title was vested in regard of the heir of the feoffee, and this in case of the King only.

What persons may be seised to an use, and what not.
What persons may be cestuy que use, *and what not.*
What persons may declare an use, and what not.

THOUGH I have opened the statute in order of words, yet I will make my division in order of matter, namely,

1. The raising of uses.
2. The interruption of uses.
3. The executing of uses.

Again, the raising of uses doth easily divide itself into three parts: The persons that are actors to the conveyance to use. The use itself. The form of the conveyance.

Then it is first to be seen what persons may be seised

to an use, and what not; and what persons may be *cestuy que use*, and what not.

The King cannot be seised to an use; no, not where he taketh in his natural body, and to some purpose as a common person; and therefore if land be given to the King and I. D. *pour terme de leur vies*, this use is void for a moiety.

Like law is, if the King be seised of land in the right of his duchy of Lancaster, and covenanteth by his letters patents under the duchy seal to stand seised to the use of his son, nothing passeth.

Like law, if King R. III. who was feoffee to diverse uses before he took upon him the crown, had, after he was King, by his letters patents granted the land over, the uses had not been renewed.

The Queen, speaking not of an imperial Queen but by marriage, cannot be seised to an use, though she be a body enabled to grant and purchase without the King: yet in regard of the government and interest the King hath in her possession, she cannot be seised to an use.

A corporation cannot be seised to an use, because their capacity is to a use certain; again, because they cannot execute an estate without doing wrong to their corporation or founder; but chiefly because of the letter of this statute which, in any clause when it speaketh of the feoffee, resteth only upon the word, person, but when it speaketh of *cestuy que use*, it addeth person or body politic.

If a bishop bargain or sell lands whereof he is seised in the right of his see, this is good during his life; otherwise it is where a bishop is infeoffed to him and his successors, to the use of I. D. and his heirs, that is not good, no not for the bishop's life, but the use is merely void.

Contrary law of tenant in tail; for if I give land in tail by deed since the statute to A, to the use of B and his heirs; B hath a fee-simple determinable upon the death of A without issue. And like law, though doubtful before the statute, was; for the chief reason which bred the doubt before the statute, was

because tenant in tail could not execute an estate without wrong; but that since the statute is quite taken away, because the statute saveth no right of intail, as the statute of 1 R. III. did; and that reason likewise might have been answered before the statute, in regard of the common recovery.

A feme covert and an infant, though under years of discretion, may be seised to an use; for as well as land might descend unto them from a feoffee to use, so may they originally be infeoffed to an use; yet if it be before the statute, and they had, upon a *subpœna* brought, executed their estate during the coverture or infancy, they might have defeated the same; and when they should have been seised again to the use, and not to their own use; but since the statute no right is saved unto them.

If a feme covert or an infant be infeoffed to an use precedent since the statute, the infant or baron come too late to discharge or root up the feoffment; but if an infant be infeoffed to the use of himself and his heirs, and I. D. pay such a sum of money to the use of I. G. and his heirs, the infant may disagree and overthrow the contingent use.

Contrary law, if an infant be infeoffed to the use of himself for life, the remainder to the use of I. S. and his heirs, he may disagree to the feoffment as to his own estate, but not to divest the remainder, but it shall remain to the benefit of him in remainder.

And yet if an attainted person be infeoffed to an use, the King's title, after office found, shall prevent the use, and relate above it; but until office the *cestuy que use* is seised of the land.

Like law of an alien; for if land be given to an alien to an use, the use is not void *ab initio:* yet neither alien or attainted person can maintain an action to defend the land.

The King's villain if he be infeoffed to an use, the King's title shall relate above the use; otherwise in case of a common person.

But if the lord be infeoffed to the use of his villain, the use neither riseth, but the lord is in by the common law, and not by the statute discharged of the use.

But if the husband be infeoffed to the use of his wife for years, if he die the wife shall have the term, and it shall not inure by way of discharge, although the husband may dispose of the wife's term.

So if the lord of whom the land is held be infeoffed to the use of a person attainted, the lord shall not hold by way of discharge of the use, because of the King's title, *annum, diem et vastum.*

A person uncertain is not within the statute, nor any estate *in nubibus* or suspense executed: as if I give land to I. S. the remainder to the right heirs of I. D. to the use of I. N. and his heirs, I. N. is not seised of the fee-simple of an estate *pour vie* of I. S. till I. D. be dead, and then in fee-simple.

Like law, if before the statute I give land to I. S. *pour autre vie* to an use, and I. S. dieth, living *cestuy que use*, whereby the freehold is in suspense, the statute cometh, and no occupant entreth: the use is not executed out of the freehold in suspense for the occupant, the disseisor, the lord by escheat. The feoffee upon consideration, not having notice, and all other persons which shall be seised to use, not in regard of their persons but of their title; I refer them to my division touching disturbance and interruption of uses.

It followeth now to see what person may be a *cestuy que use.* The King may be *cestuy que use;* but it behoveth both the declaration of the use, and the conveyance itself, to be matter of record, because the King's title is compounded of both; I say, not appearing of record, but by conveyance of record. And therefore if I covenant with I. S. to levy a fine to him to the King's use, which I do accordingly; and this deed of covenant be not inrolled, and the deed be found by office, the use vesteth not. *E converso,* if inrolled. If I covenant with I. S. to infeoff him to the King's use, and the deed be inrolled, and the feoffment also be found by office, the use vesteth.

But if I levy a fine, or suffer a recovery to the King's use, and declare the use by deed of covenant inrolled, though the King be not party, yet it is good enough.

A corporation may take an use, and yet it is not

material whether the feoffment or the declaration be by deed; but I may infeoff I. S. to the use of a corporation, and this use may be averred.

An use to a person uncertain is not void in the first limitation, but executeth not till the person be *in esse;* so that this is positive, that an use shall never be in abeyance as a remainder may be, but ever in a person certain upon the words of the statute, and the estate of the feoffees shall be in him or them which have the use. The reason is, because no confidence can be reposed in a person unknown and uncertain; and therefore if I make a feoffment to the use of I. S. for life, and then to the use of the right heirs of I. D. the remainder is not in abeyance, but the reversion is in the feoffor, *quousque.* So that upon the matter all persons uncertain in use, are like conditions or limitations precedent.

Like law, if I infeoff one to the use of I. S. for years, the remainder to the right heirs of I. D. this is not executed in abeyance, and therefore not void.

Like law, if I make a feoffment to the use of my wife that shall be, or to such persons as I shall maintain, though I limit no particular estate at all; yet the use is good, and shall in the interim return to the feoffor.

Contrary law, if I once limit the whole fee-simple of the use out of land, and part thereof to a person uncertain, it shall never return to the feoffor by way of fraction of the use: but look how it should have gone unto the feoffor; if I begin with a contingent use, so it shall go to the remainder; if I intail a contingent use, both estates are alike subject to the contingent use when it falleth; as when I make a feoffment in fee to the use of my wife for life, the remainder to my first begotten son; I having no son at that time, the remainder to my brother and his heirs: if my wife die before I have any son, the use shall not be in me, but in my brother. And yet if I marry again, and have a son, it shall divest from my brother, and be in my son, which is the skipping they talk so much of.

So if I limit an use jointly to two persons, not *in esse,*

and the one cometh to be *in esse*, he shall take the entire use; and yet if the other afterward come *in esse*, he shall take jointly with the former; as if I make a feoffment to the use of my wife that shall be, and my first begotten son for their lives, and I marry; my wife taketh the whole use, and if I afterwards have a son, he taketh jointly with my wife.

But yet where words of abeyance work to an estate executed in course of possession, it shall do the like in uses; as if I infeoff A to the use of B for life, the remainder to C for life, the remainder to the right heirs of B, this is a good remainder executed.

So if I infeoff A to the use of his right heirs, A is in the fee-simple, not by the statute, but by the common law.

Now are we to examine a special point of the disability of such persons as do take by the statute: and that upon the words of the statute, where divers persons are seised to the use of other persons; so that by the letter of the statute, no use is contained: but where the feoffor is one, and *cestuy que use* is another.

Therefore it is to be seen in what cases the same persons shall be both seised to the use and *cestuy que use*, and yet in by the statute; and in what cases they shall be diverse persons, and yet in by the common law; wherein I observe unto you three things: First, that the letter is full in the point. Secondly, that it is strongly urged by the clause of joint estates following. Thirdly, that the whole scope of the statute was to remit the common law, and never to intermeddle where the common law executed an estate; therefore the statute ought to be expounded, that where the party seised to the use, and the *cestuy que use* is one person, he never taketh by the statute, except there be a direct impossibility or impertinency for the use, to take effect by the common law.

And if I give land to I. S. to the use of himself and his heirs, and if I. D. pay a sum of money, then to the use of I. D. and his heirs, I. S. is in of an estate for life, or for years, by way of abridgement of estate in course of possession, and I. D. in of the fee-simple by the statute.

So if I bargain and sell my land after seven years, the inheritance of the use only passeth; and there remains an estate for years by a kind of substraction of the inheritance or occupier of my estate, but merely at the common law.

But if I infeoff I. S. to the use of himself in tail, and then to the use of I. D. in fee, or covenant to stand seized to the use of myself in tail, and to the use of my wife in fee; in both these cases the estate tail is executed by this statute; because an estate tail cannot be re-occupied out of a fee-simple, being a new estate, and not like a particular estate for life or years, which are but portions of the absolute fee; and therefore if I bargain and sell my land to I. S. after my death without issue, it doth not leave an estate tail in me, nor vesteth any present fee in the bargain, but is an use expectant.

So if I infeoff I. S. to the use of I. D. for life, and then to the use of himself and his heirs, he is in of the fee-simple merely in course of possession, and as of a reversion, and not of a remainder.

Contrary law, if I infeoff I. S. to the use of I. D. for life, then to the use of himself for life, the remainder to the use of I. N. in fee: Now the law will not admit fraction of estates; but I. S. is in with the rest by the statute.

So if I infeoff I. S. to the use of himself and a stranger, they shall be both in by the statute, because they could not take jointly, taking by several titles.

Like law, if I infeoff a bishop and his heirs to the use of himself, and his successors, he is in by the statute in the right of his see.

And as I cannot raise a present use to one out of his own seisin; so if I limit a contingent or future use to one being at the time of limitation not seised, but after become seised at the time of the execution of the contingent use, there is the same reason and the same law, and upon the same difference which I have put before.

As if I covenant with my son, that after his marriage I will stand seised of land to the use of himself

and his heirs; and before marriage I infeoff him to the use of himself and his heirs, and then he marrieth; he is in by the common law, and not by the statute; like law of a bargain and sale.

But if I had lett to him for life only, then he should have been in for life only by the common law, and of the fee-simple by statute. Now let me advise you of this, that it is not a matter of subtilty or conceit to take the law right, when a man cometh in by the law in course of possession, and where he cometh in by the statute in course of possession: but it is material for the deciding of many causes and questions, as for warranties, actions, conditions, waivers, suspicions, and divers other provisoes.

For example; a man's farmer committed waste: after he in reversion covenanteth to stand seised to the use of his wife for life, and after to the use of himself and his heirs; his wife dies; if he be in his fee untouched, he shall punish the waste; if he be in by the statute, he shall not punish it.

So if I be infeoffed with warranty, and I covenant with my son to stand seised to the use of myself for life, and after to him and his heirs; if I be in by the statute, it is clear my warranty is gone; but if I be in by the common law, it is doubtful.

So if I have an eigne right, and be infeoffed to the use of I. S. for life, then to the use of myself for life, then to the use of I. D. in fee, I. S. dieth. If I be in by the common law, I cannot waive my estate, having agreed to the feoffment: but if I am in by the statute, yet I am not remitted, because I come in by my own act: but I may waive my use, and bring an action presently; for my right is saved unto me by one of the savings in the statute. Now on the other side it is to be seen, where there is a seisin to the use of another person; and yet it is out of the statute which is in special cases upon the ground, wheresoever *cestuy que use* had remedy for the possession by course of common law, there the statute never worketh; and therefore if a disseisin were committed to an use, it is in him by the common law upon agreement: so if one

enter as occupant to the use of another, it is in him till disagreement.

So if a feme infeoff a man, *causa matrimonii prælocuti*, she hath a remedy for the land again by course of the law; and therefore in those special cases the statute worketh not; and yet the words of the statute are general, where any person stands seised by force of any fine, recovery, feoffment, bargain and sale, agreement or otherwise; but yet the feme is to be restrained for the reason aforesaid.

It remaineth to show what persons may limit and declare an use: wherein we must distinguish; for there are two kinds of declarations of uses, the one of a present use upon the first conveyance, the other upon a power of revocation or new declaration; the latter of which I refer to the division of revocation: now for the former.

The King upon his letters patent may declare an use, though the patent itself implieth an use, if none be declared.

If the King gives lands by his letters to I. S. and his heirs, to the use of I. S. for life, the King hath the inheritance of the use by implication of the patent, and no office needeth; for implication out of matter of record, amounteth ever to matter of record.

If the Queen give land to I. S. and his heirs to the use of all the church-wardens of the church of Dale, the patentee is seised to his own use, upon that confidence or intent; but if a common person had given land in that manner, the use had been void by the statute of 23 H. VIII. and the use had returned to the feoffor and his heirs. A corporation may take an use without deed, as hath been said before; but can limit no use without deed.

An infant may limit an use upon a feoffment, fine, or recovery, and he cannot countermand or avoid the use, except he avoid the conveyance; contrary, if an infant covenant in consideration of blood or marriage to stand seised to an use, the use is merely void.

If an infant bargain and sell his land for money, for commons or teaching, it is good with averment; if for

money, otherwise: if it be proved it is avoidable; if for money recited and not paid, it is void: and yet in the case of a man of full age the recital sufficeth.

If baron and feme be seised in the right of the feme, or by joint purchase during the coverture, and they join in a fine, the baron cannot declare the use for longer time than the coverture, and the feme cannot declare alone; but the use goeth, according to the limitation of law, unto the feme and her heirs; but they may both join in declaration of the use in fee; and if they sever, then it is good for so much of the inheritance, as they concurred in; for the law avoucheth all one as if they joined: as if the baron declare an use to I. S. and his heirs, and the feme another to I. D. for life, and then to I. S. and his heirs, the use is good to I. S. in fee.

And if upon examination the feme will declare the use to the judge, and her husband agree not to it, it is void, and the baron's use is only good; the rest of the use goeth according to the limitation of law.

THE

ARGUMENTS

IN

L A W

OF

SIR FRANCIS BACON, KNIGHT,

THE KING'S SOLICITOR-GENERAL,

IN

CERTAIN GREAT AND DIFFICULT CASES.

To my loving Friends and Fellows,

THE

READERS, ANCIENTS,

UTTER-BARRISTERS, AND STUDENTS,

OF

GRAY'S-INN.

I DO not hold the law of England in so mean an account, but that which other laws are held worthy of, should be due likewise to our laws, as no less worthy for our state. Therefore when I found that not only in the ancient times, but now at this day, in France, Italy, and other nations, the speeches, and, as they term them, pleadings, which have been made in judicial cases, where the cases were mighty and famous, have been set down by those that made them, and published; so that not only a Cicero, a Demosthenes, or an Æschines, hath set forth his Orations, as well in the judicial as deliberative; but a Marrian and a Pavier have done the like by their pleadings; I know no reason why the same should not be brought in use by the professors of our law for their arguments in principal cases. And this I think the more necessary, because the compendious form of reporting resolutions, with the substance of the reasons, lately used by Sir Edward Coke, lord Chief Justice of the King's bench, doth not delineate or trace out to the young practisers of law a method and form of argument for them to imitate. It is true I could have wished some abler person had begun; but it is a kind of order sometimes to begin with the meanest. Nevertheless thus much I may say with modesty, that these arguments which I have set forth, most of them, are upon subjects not vulgar; and therewithal, in regard of the commixture, which the course of my life hath made of law with other studies, they may have the more va-

riety, and perhaps the more depth of reason: for the reasons of municipal laws, severed from the grounds of nature, manners, and policy, are like wall flowers, which though they grow high upon the crests of states, yet they have no deep root: besides, in all public services I ever valued my reputation more than my pains; and therefore in weighty causes I always used extraordinary diligence; in all which respects I persuade myself the reading of them will not be unprofitable. This work I knew not to whom to dedicate, rather than to the Society of GRAY'S-INN, the place whence my father was called to the highest place of justice, and where myself have lived and had my procedure so far, as by his Majesty's rare if not singular grace, to be of both his councils: and therefore few men, so bound to their societies by obligation, both ancestral and personal, as I am to yours; which I would gladly acknowledge not only in having your name joined with mine own in a book, but in any other good office and effect which the active part of my life and place may enable me unto toward the Society, or any of you in particular. And so I bid you right heartily farewel.

Your assured loving friend and fellow,

FRANCIS BACON.

THE

CASE

OF

IMPEACHMENT OF WASTE.

ARGUED

BEFORE ALL THE JUDGES IN THE EXCHEQUER CHAMBER.

THE case needs neither repeating nor opening. The point is in substance but one, familiar to be put, but difficult to be resolved; that is, Whether, upon a lease without impeachment of waste, the property of the timber-trees, after severance, be not in him that is owner of the inheritance?

The case is of great weight, and the question of great difficulty: weighty it must needs be, for that it doth concern, or may concern, all the lands in England; and difficult it must be, because this question sails *in confluentiis aquarum*, in the meeting or strife of two great tides. For there is a strong current of practice and opinion on the one side, and there is a more strong current, as I conceive, of authorities, both ancient and late, on the other side. And therefore, according to the reverend custom of the realm, it is brought now to this assembly; and it is high time the question receive an end, the law a rule, and mens conveyances a direction.

This doubt ariseth and resteth upon two things to be considered; first, to consider of the interest and property of a timber-tree, to whom it belongeth: and secondly, to consider of the construction and operation of these words or clause, *absque impetitione vasti:* for within these two branches will aptly fall whatsoever can be pertinently spoken in this question, without obscuring the question by any other curious division.

For the first of these considerations, which is the interest or property of a timber-tree, I will maintain and prove to your lordships three things.

First, That a timber-tree, while it groweth, is merely parcel of the inheritance, as well as the soil itself.

And, secondly, I will prove, that when either nature, or accident, or the hand of man hath made it transitory, and cut it off from the earth, it cannot change the owner, but the property of it goes where the inheritance was before. And thus much by the rules of the common law.

And, thirdly, I will shew that the statute of Gloucester doth rather corroborate and confirm the property in the lessor, than alter it, or transfer it to the lessee.

And for the second consideration, which is the force of that clause, *absque impetitione vasti*, I will also uphold and make good three other assertions.

First, That if that clause should be taken in the sense which the other side would force upon it, that it were a clause repugnant to the estate and void.

Secondly, That the sense which we conceive and give, is natural in respect of the words; and for the matter agreeable to reason and the rules of law.

And lastly, That if the interpretation seem ambiguous and doubtful, yet the very mischief itself, and consideration of the commonwealth, ought rather to incline your lordships judgment to our construction.

My first assertion therefore is, that a timber-tree is a solid parcel of the inheritance; which may seem a point admitted, and not worth the labouring. But there is such a chain in this case, as that which seemeth most plain, if it is sharply looked into, doth invincibly draw on that which is most doubtful. For if the tree be parcel of the inheritance unsevered, inherent in the reversion, severance will not alien it, nor the clause will not divest it.

To open therefore the nature of an inheritance: sense teacheth there be, of the soil and earth, parts that are raised and eminent, as timber-trees, rocks, houses. There be parts that are sunk and depressed, as

mines, which are called by some *arbores subterraneæ*, because that as trees have great branches and smaller boughs and twigs; so have they in their region greater and smaller veins: so if we had in England beds of porcelane, such as they have in China, which porcelane is a kind of a plaster buried in the earth, and by length of time congealed and glazed into that fine substance; this were as an artificial mine, and no doubt part of the inheritance. Then are there the ordinary parts, which make the mass of the earth, as stone, gravel, loam, clay, and the like.

Now as I make all these much in one degree, so there is none of them, not timber-trees, not quarries, not minerals or fossils, but hath a double nature; inheritable and real, while it is contained within the mass of the earth; and transitory and personal, when it is once severed. For even gold and precious stone, which is more durable out of earth than any tree is upon the earth; yet the law doth not hold of that dignity as to be matter of inheritance if it be once severed. And this is not because it becometh moveable, for there be moveable inheritances, as villains in gross, and dignities which are judged hereditaments; but because by their severance they lose their nature of perpetuity, which is of the essence of an inheritance.

Nevil's case proving there are inheritances which are not local.

And herein I do not a little admire the wisdom of the laws of England, and the consent which they have with the wisdom of philosophy and nature itself: for it is a maxim in philosophy, that *in regione elementari nihil est æternum, nisi per propagationem speciei, aut per successionem partium.*

The consent of the law with philosophy in distinguishing between perpetual and transitory.

And it is most evident, that the elements themselves, and their products, have a perpetuity not *in individuo*, but by supply and succession of parts. For example, the vestal fire, that was nourished by the virgins at Rome, was not the same fire still, but was in perpetual waste, and in perpetual renovation. So it is of the sea and waters, it is not the same water individually, for that exhales by the sun, and is fed again by showers. And so of the earth itself, and mines, quarries, and

whatsoever it containeth, they are corruptible individually, and maintained only by succession of parts, and that lasteth no longer than they continue fixed to the main and mother globe of the earth, and is destroyed by their separation.

According to this I find the wisdom of the law, by imitation of the course of nature, to judge of inheritances and things transitory; for it alloweth no portions of the earth, no stone, no gold, no mineral, no tree, no mould to be longer inheritance than they adhere to the mass, and so are capable of supply in their parts: for by their continuance of body stands their continuance of time.

Neither is this matter of discourse, except the deep and profound reasons of law, which ought chiefly to be searched, shall be accounted discourse, as the slighter sort of wits, *Scioli*, may esteem them.

And therefore now that we have opened the nature of inheritable and transitory, let us see, upon a division of estates, and before severance, what kind of interests the law allotteth to the owner of inheritance, and what to the particular tenant; for they be competitors in this case.

The consent of the law with the civil law in the distinguishing between inheritance and particular estates, which hath relation to their division of *dominium* and *usus-fructus*. Owner in the stat. 4 H.7.

First, In general the law doth assign to the lessor those parts of the soil conjoined, which have obtained the reputation to be durable, and of continuance, and such as being destroyed, are not but by long time renewed; and to the terminors it assigneth such interests as are tender and feeble against the force of time, but have an annual or seasonable return or revenue. And herein it consents again with the wisdom of the civil law; for our inheritance and particular estate is in effect their *dominium* and *usus-fructus;* for so it was conceived upon the ancient statute of depopulations, 4 Hen. VII. which was penned, "that the "owner of the land should re-edify the houses of "husbandry," that the word *owner*, which answereth to *dominus*, was he that had the immediate inheritance; and so ran the later statutes. Let us see therefore what judgment the law maketh of a timber-tree; and whether the law doth not place it within

the lot of him that hath the inheritance as parcel thereof.

The writ of waste supposeth the felling timber to be *ad exhæredationem.*

First, It appeareth by the register out of the words of the writ of waste, that the waste is laid to be *ad exhæredationem*, which presupposeth *hæreditatem:* for there cannot be a disinherison by the cutting down of the tree, except there was an inheritance in the tree, *quia privatio præsupponit actum.*

The statute of Gloucester, *quod recuperet rem vastatam*, not *locum vastatum.*

Again it appeareth out of the words of the statute of Gloucester, well observed, that the tree and the soil are one entire thing, for the words are *quod recuperet rem vastatam;* and yet the books speak, and the very judgment in waste is, *quod recuperet locum vastatum*, which shews, that *res* and *locus* are in exposition of law taken indifferently; for the lessor shall not recover only the stem of the tree, but he shall recover the very soil, whereunto the stem continues. And therefore it is notably ruled in 22 H. VI. f. 13. that if the terminor do first cut down the tree, and then destroy the stem, the lessor shall declare upon two several wastes, and recover treble damages for them severally. But, says the book, he must bring but one writ, for he can recover the place wasted but once.

22 H. 6. f. 13.

Mullin's case.

And farther proof may be fitly alledged out of Mullin's case in the commentaries, where it is said, that for timber-trees tithes shall not be paid. And the reason of the book is well to be observed; "for that "tithes are to be paid for the revenue of the inherit-"ance, and not for the inheritance itself."

Nay, my lords, it is notable to consider what a reputation the law gives to the trees, even after they are severed by grant, as may be plainly inferred out of Herlackenden's case, L. Coke, p. 4. f. 62. I mean the principal case; where it is resolved, that if the trees being excepted out of a lease granted to the lessee, or if the grantee of trees accept a lease of the land, the property of the trees drown not, as a term should drown in a freehold, but subsist as a chattel divided; which shews plainly, though they be made transitory, yet they still to some purpose savour of the inheritance: for if you go a little farther, and put the case of a state tail, which is a state of inheritance, then I

Co. p. 4. f. 62.

think clearly they are re-annexed. But on the other side, if a man buy corn standing upon the ground, and take a lease of the same ground, where the corn stands, I say plainly it is re-affixed, for *paria copulantur cum paribus.*

And it is no less worthy the note, what an operation the inheritance leaveth behind it in matter of waste, even when it is gone, as appeareth in the case of tenant after possibility, who shall not be punished; for though the new reason be, because his estate was not within the statute of Gloucester; yet I will not go from my old master Littleton's reason, which speaketh out of the depth of the common law, he shall not be punished "for the inheritance sake which was "once in him."

But this will receive a great deal of illustration, by considering the terminor's estate, and the nature thereof, which was well defined by Mr. Heath, who spake excellent well to the case, that it is such as he ought to yield up the inheritance in as good plight as he received it; and therefore the word *firmarius*, which is the word of the statute of Marlebridge, cometh, as I conceive, *a firmando;* because he makes the profit of the inheritance, which otherwise should be upon account, and uncertain, firm and certain; and accordingly *feodi firma*, fee-farm, is a perpetuity certain. Therefore the nature and limit of a particular tenant is to make the inheritance certain, and not to make it worse.

The derivation and force of the word *firmarius.*

1. Therefore he cannot break the soil otherwise than with his ploughshare to turn up perhaps a stone, that lieth aloft; his interest is *in superficie*, not in *profundo*, he hath but *tunicam terræ*, little more than the vesture.

If we had fir-timber here, as they have in Muscovy, he could not pierce the tree to make the pitch come forth, no more than he may break the earth.

So we see the evidence, which is *propugnaculum hæreditatis*, the fortress and defence of the land, belongeth not to the lessee, but to the owner of the inheritance.

The evidence *propugnaculum hæreditatis.*

Homage importeth continuance in the blood. Particular tenants of seigniories shall not have aid.

So the lessee's estate is not accounted of that dignity, that it can do homage, because it is a badge of continuance in the blood of lord and tenant. Neither for my own opinion can a particular tenant of a manor have aid *pour file marier, ou pour faire fitz chevalier;* because it is given by law upon an intendment of continuance of blood and privity between lord and tenant.

And for the tree, which is now in question, do but consider in what a revolution the law moves, and as it were in an orb: for when the tree is young and tender, *germen terræ*, a sprout of the earth, the law giveth it to the lessee, as having a nature not permanent, and yet easily restored: when it comes to be a timber-tree, and hath a nature solid and durable, the law carrieth it to the lessor. But after again if it become a sear and a dotard, and its solid parts grow putrified, and as the poet saith, *non jam mater alit tellus viresque ministrat*, then the law returns it back to the lessee. This is true justice, this is *suum cuique tribuere;* the law guiding all things with line of measure and proportion.

The phrase that the lessee hath a special property in the tree, very improper; for he hath but the profits of the tree.

And therefore that interest of the lessee in the tree, which the books call a special property, is scarce worth that name. He shall have the shade, so shall he have the shade of a rock; but he shall not have a crystal or Bristol diamond growing upon the rock. He shall have the pannage; why? that is the fruit of the inheritance of a tree, as herb or grass is of the soil. He shall have seasonable loppings; why? so he shall have seasonable diggings of an open mine. So all these things are rather profits of the tree, than any special property in the tree. But about words we will not differ.

So as I conclude this part, that the reason and wisdom of law doth match things, as they consort, ascribing to permanent states permanent interest, and to transitory states transitory interest; and you cannot alter this order of law by fancies of clauses and liberties, as I will tell you in the proper place. And therefore the tree standing belongs clearly to the owner of the inheritance.

Now come I to my second assertion, that by the severance the ownership or property cannot be altered; but that he that had the trees as part of the inheritance before, must have it as a chattel transitory after. This is pregnant and followeth of itself, for it is the same tree still, and, as the Scripture saith, *uti arbor cadet, ita jacet.*

The owner of the whole must needs own the parts; he that owneth the cloth owneth the thread, and he that owneth an engine when it is intire, owneth the parts when it is broken; breaking cannot alter property.

Herlackenden's case.

And therefore the book in Herlackenden's case doth not stick to give it somewhat plain terms; and to say that it were an absurd thing, that the lessee which hath a particular interest in the land, should have an absolute property in that which is part of the inheritance: you would have the shadow draw the body, and the twigs draw the trunk. These are truly called absurdities. And therefore in a conclusion so plain, it shall be sufficient to vouch the authorities without enforcing the reasons.

And although the division be good, that was made by Mr. Heath, that there be four manners of severances, that is, when the lessee fells the tree, or when the lessor fells it, or when a stranger fells it, or when the act of God, a tempest, fells it; yet this division tendeth rather to explanation than to proof, and I need it not, because I do maintain that in all these cases the property is in the lessor.

Three arguments of property, damages, seisure, and power to grant.

And therefore I will use a distribution which rather presseth the proof. The question is of property. There be three arguments of property; damages, seisure, and grant: and according to these I will examine the property of the trees by the authority of books.

And first for damages.

For damages, look into the books of the law, and you shall not find the lessee shall ever recover damages, not as they are a badge of property; for the damages, which he recovereth, are of two natures, either for the special property, as they call it, or as he

is chargeable over. And for this, to avoid length, I will select three books, one where the lessee shall recover treble damages: another where he shall recover but for his special property, and the third where he shall recover for the body of the tree, which is a special case, and standeth merely upon a special reason.

44 E. 3. f. 27. The first is the book of 44 E. III. f. 27. where it is agreed, that if tenant for life be, and a disseisor commit waste, the lessee shall recover in trespass as he shall answer in waste; but that this is a kind of recovery of damages, though *per accidens*, may appear plainly.

For if the lessor die, whereby his action is gone, then the disseisor is likewise discharged, otherwise than for the special property.

9 E. 4. f. 35. The second book is 9 E. IV. f. 35. where it is admitted, that if the lessor himself cut down the tree, the lessee shall recover but for his special profit of shade, pannage, loppings, because he is not charged over.

44 E. 3. f. 44. The third is 44 E. III. f. 44. where it is said, that if the lessee fell trees to repair the barn, which is not ruinous in his own default, and the lessor come and take them away, he shall have trespass, and in that case he shall recover for the very body of the tree, for he hath an absolute property in them for that intent.

38. Ass. f. 1. And that it is only for that intent appeareth notably by the book 38 *Ass.* f. 1. If the lessee after he hath cut down the tree employ it not to reparations, but employ other trees of better value, yet it is waste; which sheweth plainly the property is respective to the employment.

5 E. 4. f. 100. Nay, 5 E. IV. f. 100. goeth farther and sheweth, that the special property which the lessee had was of the living tree, and determines, as Herlackenden's case saith, by severance; for then *magis dignum trahit ad se minus dignum:* for it saith, that the lessee cannot pay the workmens wages with those parts of the tree which are not timber. And so I leave the first demonstration of property, which is by damages; except you will add the case of 27 H. VIII. f. 13. where it is said, that if tenant for life and he in the reversion

27 H. 8. f. 13.

join in a lease for years, and lessee for years fell timber-trees, they shall join in an action of waste; but he in the reversion shall recover the whole damages: and great reason, for the special property was in the lessee for years, the general in him in the reversion, so the tenant for life meane had neither the one nor the other.

Now for the seisure, you may not look for plentiful authority in that: for the lessor, which had the more beneficial remedy by action for treble damages, had little reason to resort to the weaker remedy by seisure, and leases without impeachment were then rare, as I will tell you anon. And therefore the question of the seisure came chiefly in experience upon the case of the windfalls, which could not be punished by action of waste.

First, therefore, the case of 40 E. III. pl. 22. is express, where at the King's suit, in the behalf of the heir of Darcy who was in ward, the King's lessee was questioned in waste, and justified the taking of the trees, because they were overthrown by winds, and taken away by a stranger. But Knevet saith, although one be guardian, yet the trees, when by their fall they are severed from the freehold, he hath no property of the chattels, but they appertain to the heir, and the heir shall have trespass of them against a stranger, and not the guardian, no more than the bailiff of a manor. So that that book rules the interest of the tree to be in the heir, and goes to a point farther, that he shall have trespass for them; but of seisure there had been no question. 40 E. 3 pl. 22.

So again in 2 H. VII. the words of Brian are, that for the timber-trees the lessor may take them; for they are his; and seemeth to take some difference between them and the gravel. 2 H.7. f.1

The like reason is of the timber of an house, as appears 34 E. III. f. 5. abridged by Brook, tit. *waste*, pl. 34. when it is said, it was doubted who should have the timber of a house which fell by tempest; and saith the book, it seems it doth appertain to the lessor; and good reason, for it is no waste, and the lessee is not bound to re-edify it: and therefore it is reason the 34E.3.f.

lessor have it; but Herlackenden's case goes farther, where it is said that the lessee may help himself with the timber, if he will re-edify it; but clearly he hath no interest but towards a special employment.

Now you have had a case of the timber-tree, and of the timber of the house, now take a case of the mine, where that of the trees is likewise put, and that is 9 E. IV. f. 35. where it is said by Needham, that if a lease be made of land wherein there is tin, or iron, or lead, or coals, or quarry, and the lessor enter and take the tin or other materials, the lessee shall punish him for coming upon his land, but not for taking of the substances. And so of great trees; but Danby goes farther, and saith, the law that gives him the thing, doth likewise give him means to come by it; but they both agree that the interest is in the lessor. And thus much for the seisure.

9 E. 4. f. 35.

For the grant; it is not so certain a badge of property as the other two; for a man may have a property, and yet not grantable, because it is turned into a right, or otherwise suspended. And therefore it is true, that by the book in 21 H. VI. that if the lessor grant the trees, the grantee shall not take them, no not after the lease expired; because this property is but *de futuro*, expectant; but 'tis as plain on the other side that the lessee cannot grant them, as was resolved in two notable cases, namely, the case of Marwood and Sanders, 41 El. *in communi banco;* where it was ruled, that the tenant of the inheritance may make a feoffment with exception of timber-trees; but that if lessee for life or years set over his estate with an exception of the trees, the exception is utterly void; and the like resolution was in the case between Foster and Mills plaintiff, and Spencer and Boord defendant, 28 Eliz. rot. 820.

Marwood and Sanders, C.

Foster and Spencer's case.

Now come we to the authorities, which have an appearance to be against us, which are not many, and they be easily answered, not by distinguishing subtilly, but by marking the books advisedly.

1. There be two books that seem to cross the authorities touching the interest of the windfalls, 7 H. VI. and 44 E. 3. f. 44. where, upon waste brought and

7 H. 6. 44 E. 3. f. 44.

assigned in the succision of trees, the justification is, that they were overthrown by wind, and so the lessee took them for fuel, and allowed for a good plea; but these books are reconciled two ways: first, look into both the justifications, and you shall find that the plea did not rely only in that they were windfalls, but couples it with this, that they were first sear, and then overthrown by wind; and that makes an end of it, for sear trees belong to the lessee, standing or felled, and you have a special replication in the book of 44 E. III. that the wind did but rend them, and buckle them, and that they bore fruit two years after. And 2dly, you have ill luck with your windfalls, for they be still apple-trees which are but wastes *per accidens*, as willows or thorns are in the sight of a house; but when they are once felled they are clearly matter of fuel.

Another kind of authorities, that make shew against us, are those that say that the lessee shall punish the lessor in trespass for taking the trees, which are 5 H. IV. f. 29. and 1 Mar. *Dier*. f. 90. Mervin's case; and you might add if you will 9 E. IV. the case vouched before: unto which the answer is, that trespass must be understood for the special property, and not for the body of the tree; for those two books speak not a word, what he shall recover, nor that it shall be to the value. And therefore 9 E. IV. is a good expositor, for that distinguisheth where the other two books speak indefinitely; yea, but 5 H. IV. goes farther, and saith, that the writ shall purport *arbores suas*, which is true in respect of the special property; neither are writs to be varied according to special cases, but are framed to the general case, as upon lands recovered in value in tail, the writ shall suppose *donum*, a gift.

5 H. 4. f. 29.
1 Ma. f. 90.

And the third kind of authority is some books, as 13 H. VII. f. 9. that say, that trespass lies not by the lessor against the lessee for cutting down trees, but only waste; but that it is to be understood of trespass *vi et armis*, and would have come fitly in question, if there had been no seisure in this case.

13 H. 7. f. 9.

Upon all which I conclude, that the whole current of authorities proveth the properties of the trees upon

severance to be in the lessor by the rules of the common law; and that although the common law would not so far protect the folly of the lessor, as to give him remedy by action, where the state was created by his own act: yet the law never took from him his property; so that as to the property, before the statute and since, the law was ever one.

Now come I to the third assertion, that the statute of Gloucester hath not transferred the property of the lessee upon an intendment of recompense to the lessor; which needs no long speech: it is grounded upon a probable reason, and upon one special book.

The reason is, that damages are a recompense for property; and therefore that the statute of Gloucester giving damages should exclude property. The authority seems to be 12 E. 4. f. 8. where Catesbey affirming that the lessee at will shall have the great trees, as well as lessee for years or life; Fairfax and Jennings correct it with a difference, that the lessor may take them in the case of tenant at will, because he hath no remedy by the statute, but not in case of the termors.

12 E. 4. f. 8.

This conceit may be reasonable thus far, that the lessee shall not both seise and bring waste; but if he seise, he shall not have his action; if he recover by action, he shall not seise: for a man shall not have both the thing and recompense; it is a bar to the highest inheritance, the kingdom of heaven, *receperunt mercedem suam.* But at the first, it is at his election, whether remedy he will use, like as in the case of trespass: where if a man once recover in damages, it hath concluded and turned the property. Nay, I invert the argument upon the force of the statute of Gloucester thus: that if there had been no property at common law; yet the statute of Gloucester, by restraining the waste, and giving an action, doth imply a property: whereto a better case cannot be put than the case upon the statute *de donis conditionalibus*, where there are no words to give any reversion or remainder; and yet the statute giving a *formedon*, where it lay not before, being but an action, implies an actual reversion and remainder.

Thus have I passed over the first main part, which I have insisted upon the longer, because I shall have use of it for the clearing of the second.

A statute giving an action implieth an interest.

Now to come to the force of the clause *absque impetitione vasti*. This clause must of necessity work in one of these degrees, either by way of grant of property, or by way of power and liberty knit to the state, or by way of discharge of action; whereof the first two I reject, the last I receive.

No grant of property.

Therefore I think the other side will not affirm, that this clause amounts to a grant of trees; for then, according to the resolution in Herlackenden's case, they should go to the executors, and the lessee might grant them over, and they might be taken after the state determined. Now it is plain that this liberty is created with the estate, passeth with the estate, and determines with the estate.

5 H. 5.

That appears by 5 Hen. V. where it is said, that if lessee for years without impeachment of waste accept a confirmation for life, the privilege is gone.

3 E. 3. 28 H. 8.

And so are the books in 3 E. III. and 28 H. VIII. that if a lease be made without impeachment of waste *pour autre vie*, the remainder to the lessee for life, the privilege is gone, because he is in of another estate; so then plainly it amounts to no grant of property, neither can it any ways touch the property, nor enlarge the special property of the lessee: for will any man say, that if you put Marwood and Sanders's case of a lease without impeachment of waste, that he may grant the land with the exception of the trees any more than an ordinary lessee? Or shall the windfalls be more his in this case than in the other? for he was not impeachable of waste for windfalls no more than where he hath the clause. Or will any man say, that if a stranger commit waste, such a lessee may seise? These things, I suppose, no man will affirm. Again, why should not a liberty or privilege in law be as strong as a privilege in fact? as in the case of tenant after possibility: Or where there is a lessee for life the remainder

for life? for in these cases they are privileged from waste, and yet that trenches not the property.

Now therefore to take the second course, that it should be as a real power annexed to the state; neither can that be, for it is the law that moldeth estates, and not mens fancies. And therefore if men by clauses, like voluntaries in music, run not upon the grounds of law, and do restrain an estate more than the law restrains it, or enable an estate more than the law enables it, or guide an estate otherwise than the law guides it, they be mere repugnancies and vanities. And therefore if I make a feoffment in fee, provided the feoffee shall not fell timber, the clause of condition is void. And so on the other side, if I make a lease with a power that he shall fell timber, it is void.

So if I make a lease with a power that he may make feoffment, or that he may make leases for forty years, or that if he make default I shall not be received, or that the lessee may do homage; these are plainly void, as against law, and repugnant to the state. No, this cannot be done by way of use, except the words be apt, as in Mildmay's case: neither is this clause, in the sense that they take it, any better.

Therefore laying aside these two constructions, whereof the one is not maintained to be, the other cannot be: let us come to the true sense of this clause, which is by way of discharge of the action, and no more: wherein I will speak first of the words, then of the reason, then of the authorities which prove our sense, then of the practice, which is pretended to prove theirs; and lastly, I will weigh the mischief how it stands for our construction or theirs.

It is an ignorant mistaking of any man to take impeachment for *impedimentum*, and not for *impetitio*; for it is true that *impedimentum* doth extend to all hindrances, or disturbances, or interruptions, as well in *pais* as judicial. But *impetitio* is merely a judicial claim or interruption by suit in law, and upon the matter all one with *implacitatio*. Wherein first we may take light of the derivation of *impetitio*, which is a compound of the preposition *in*, and the verb *peto*.

whereof the verb *peto* itself doth signify a demand, but yet properly such a demand as is not *extrajudicial:* for the words *petit judicium, petit auditum brevis, etc.* are words of acts judicial; as for the demand in *pais,* it is rather *requisitio* than *petitio,* as *licet sæpius requisitus;* so much for the verb *peto.* But the preposition *in* enforceth it more, which signifies *against:* as *Cicero in Verrem, in Catilinam;* and so in composition, to inveigh, is to speak against; so it is such a demand only where there is a party raised to demand against, that is an adversary, which must be in a suit in law; and so it is used in records of law.

As Coke lib. 1. f. 17. Porter's case, it was pleaded in bar, that *dicta domina regina nunc ipsos Johannem et Henricum Porter petere seu occasionare non debet,* that is, *implacitare.*

So likewise Coke l. 1. f. 27. case of Alton woods, *quod dicta domina regina nunc ipsum proinde aliqualiter impetere seu occasionare non debet.*

So in the book of entries f. 1. *lit.* D. 15 H. VII. rot. 2. *inter placita regis, et super hoc venit W. B. commonachus abbatis W. loci illius ordinarii, gerensque vices ipsius abbatis, ad quoscunque clericos de quolibet crimine coram domino rege impetitos sive irritatos calumniand'.* So much *ex vi et usu termini.*

For reason: first, it ought to be considered, that the punishment of waste is strict and severe, because the penalty is great, treble damages, and the place wasted: and again, because the lessee must undertake for the acts of strangers: whereupon I infer, that the reason which brought this clause in use, *ab initio,* was caution to save, and to free men from the extremity of the penalty, and not any intention to countermand the property.

Add to this that the law doth assign in most cases double remedy, by matter of suit, and matter in *pais;* for disseisins, actions and entries; for trespasses, action and seisure; for nuisances, action and abatement: and, as Littleton doth instruct us, one of these remedies may be released without touching the other. If the disseisee release all actions, saith Littleton, yet my

entry remains; but if I release all demands or remedies, or the like words of a general nature, it doth release the right itself. And therefore I may be of opinion, that if there be a clause of grant in my lease expressed, that if my lessee or his assigns cut down and take away any timber-trees, that I and my heirs will not charge them by action, claim, seisure, or other interruption, either this shall inure by way of covenant only, or if you take it to inure by way of absolute discharge, it amounts to a grant of property in the trees, like as the case of 31 *assis*. I grant, that if I pay not you 10*l. per annum* at such feasts, you shall distrain for it in my manor of Dale, though this sound executory in power, yet it amounts to a present grant of a rent. So as I conclude that the discharge of action the law knows, grant of the property the law knows, but this same mathematical power being a power amounting to a property, and yet no property, and knit to a state that cannot bear it, the law knoweth not, *tertium penitus ignoramus.*

31 *Assis.* A clause that sounds to a power amounts to a property, if the state bear it.

For the authorities, they are of three kinds, two by inference, and the third direct.

42 E. 3. f. 23, 24.

The first I do collect upon the books of 42 Edw. III. f. 23, and 24. by the difference taken by Mowbray, and agreed by the court, that the law doth intend the clause of disimpeachment of waste to be a discharge special, and not general or absolute; for there the principle case was, that there was a clause in the lease, that the lessor should not demand any right, claim, or challenge in the lands during the life of the lessee. It is resolved by the book, that it is no bar in waste; but that if the clause had been, that the lessee should not have been impeached for waste, clearly a good bar; which demonstrates plainly, that general words, be they never so loud and strong, bear no more than the state will bear, and to any other purpose are idle. But special words that inure by way of discharge of action, are good and allowed by law.

4 E. 2. Fitzh. tit. waste 15. 17 E. 3. f. 7. Fitzh. tit. waste 101.

The same reason is of the books 4 Ed. II. Fitzh. tit. *waste* 15. and 17 E. III. f. 7. Fitzh. tit. *waste* 101. where there was a clause, *Quod liceat facere commodum suum meliori modo quo poterit.* Yet, saith Skip-

with, doth this amount, that he shall for the making of his own profit disinherit the lessor? *Nego consequentiam;* so that still the law allows not of the general discharge, but of the special that goeth to the action.

The second authority by inference is out of 9 H. VI fol. 35. Fitzh. tit. *waste* 39. and 32 H.VIII. Dyer. f. 47. where the learning is taken, that notwithstanding this clause be inserted into a lease, yet a man may reserve unto himself remedy by entry: but say I, if this clause should have that sense, which they on the other side would give it, namely, that it should amount to an absolute privilege and power of disposing, then were the proviso flat repugnant, all one as if it were *absque impetitione vasti, proviso quod non faciet vastum;* which are contradictories: and note well that in the book of 9 H.VI. the proviso is *quod non faciat vastum voluntarium in domibus;* which indeed doth but abridge in one kind, and therefore may stand without repugnancy: but in the latter book it is general, that is to say *absque impetitione vasti, et si contigerit ipsum facere vastum tunc licebit reintrare.* And there Shelley making the objection, that the condition was repugnant, it is salved thus, *sed aliqui tenuerunt* that this word *impetitione vasti* is to be understood that he shall not be impleaded by waste, or punished by action; and so indeed it ought: those *aliqui recte tenuerunt.*

9 H.6. f.35. Fitzh. tit. waste 39. 32 H. 8. Dyer, f.47.

For the authorities direct, they are two, the one 27 H. VI. Fitzh. tit. *waste* 8. where a lease was made without impeachment of waste, and a stranger committed waste, and the rule is, that the lessee shall recover in trespass only for the crop of the tree, and not for the body of the tree. It is true it comes by a *dicitur,* but it is now a *legitur:* and a *query* there is, and reason, or else this long speech were time ill spent.

27 H. 6. Fitzh. tit. waste 8.

And the last authority is the case of Sir Moyle Finch and his mother, referred to my lord Wrey and Sir Roger Manwood, resolved upon conference with other of the judges vouched by Wrey in Herlackenden's case,

and reported to my lord Chief Justice here present, as a resolution of law, being our very case.

Statute, etc. Marlebridge.

And for the cases to the contrary, I know not one in all the law direct: they press the statute of Marlebridge, which hath an exception in the prohibition, *firmarii non facient vastum*, &c. *nisi specialem inde habuerint concessionem per scriptum conventionis, mentionem faciens, quod hoc facere possint*. This presseth not the question; for no man doubteth, but it will excuse in an action of waste: and again, *nisi habeant specialem concessionem* may be meant of an absolute grant of the trees themselves; and otherwise the clause *absque impetitione vasti* taketh away the force of the statute, and looseth what the statute bindeth; but it toucheth not the property at common law.

Littleton.

For Littleton's case in his title *Of conditions*, where it is said, that if a feoffment in fee be made upon condition, that the feoffee shall infeoff the husband and wife, and the heirs of their two bodies; and that the husband die, that now the feoffee ought to make a lease without impeachment of waste to the wife, the remainder to the right heirs of the body of her husband and her begotten; whereby it would be inferred, that such a lessee should have equal privilege with tenant in tail: the answer appears in Littleton's own words, which is, that the feoffee ought to go as near the condition, and as near the intent of the condition as he may. But to come near is not to reach, neither doth Littleton undertake for that.

Culpepper's case. 2 Eliz. Dyer, f. 184.

As for Culpepper's case, it is obscurely put, and concluded in division of opinion; but yet so as it rather makes for us. The case is 2 Eliz. Dyer, f. 184. and is in effect this: a man makes a lease for years, excepting timber-trees, and afterwards makes a lease without impeachment of waste to John a Style, and then granteth the land and trees to John a Down, and binds himself to warrant and save harmless John a Down against John a Style; John a Style cutteth down the trees; the question was, whether the bond were forfeited? and that question resorteth to the other question; whether John a Style, by virtue of such

lease, could fell the trees? and held by Weston and Brown that he could not: which proves plainly for us that he had no property by that clause in the tree; though it is true that in that case the exception of the trees turneth the case, and so in effect it proveth neither way.

For the practice, if it were so ancient and common, as is conceived; yet since the authorities have not approved, but condemned it, it is no better than a popular error: it is but *pedum visa est via*, not *recta visa est via*. But I conceive it to be neither ancient nor common. It is true I find it first in 19 E. II. I mean such a clause, but it is one thing to say that the clause is ancient; and it is another thing to say, that this exposition, which they would now introduce, is ancient. And therefore you must note that a practice doth then expound the law, when the act which is practised, were merely tortious or void, if the law should not approve it: but that is not the case here, for we agree the clause to be lawful; nay, we say that it is in no sort inutile but there is use of it, to avoid this severe penalty of treble damages. But to speak plainly, I will tell you how this clause came in from 13 of E. I. till about 12 of E. IV. The state tail though it had the qualities of an inheritance, yet it was without power to alien; but as soon as that was set at liberty, by common recoveries, then there must be found some other device, that a man might be an absolute owner of the land for the time, and yet not enabled to alien, and for that purpose was this clause found out: for you shall not find in one amongst a hundred, that farmers had it in their leases; but those that were once owners of the inheritance, and had put it over to their sons or next heirs, reserved such a beneficial state to themselves. And therefore the truth is, that the flood of this usage came in with perpetuities, save that the perpetuity was to make an inheritance like a stem for life, and this was to make a stem for life like an inheritance; both concurring in this, that they presume to create phantastical estates, contrary to the ground of law.

Practice.

And therefore it is no matter though it went out with the perpetuities, as it came in, to the end that men that have not the inheritance should not have power to abuse the inheritance.

And for the mischief, and consideration of *bonum publicum*, certainly this clause with this opposition tendeth but to make houses ruinous, and to leave no timber upon the ground to build them up again; and therefore let men in God's name, when they establish their states, and plant their sons or kinsmen in the inheritance of some portions of their lands, with reservation of the freehold to themselves, use it, and enjoy it in such sort, as may tend *ad ædificationem*, and not *ad destructionem;* for that is good for posterity, and for the state in general.

And for the timber of this realm, it is *vivus thesaurus regni;* and it is the matter of our walls, walls not only of our houses, but of our island: so as it is a general disinherison to the kingdom to favour that exposition, which tends to the decay of it, being so great already; and to favour waste when the times themselves are set upon waste and spoil. Therefore since the reason and authorities of law, and the policy of estate do meet, and that those that have, or shall have such conveyances, may enjoy the benefit of that clause to protect them in a moderate manner, that is, from the penalty of the action; it is both good law and good policy for the kingdom, and not injurious or inconvenient for particulars, to take this clause strictly, and therein to affirm the last report. And so I pray judgment for the plaintiff.

THE

ARGUMENT

IN

LOW'S CASE OF TENURES

IN THE KING'S BENCH.

THE manor of Alderwasley, parcel of the Duchy, and lying out of the county Palatine, was, before the Duchy came to the crown, held of the King by knight's service *in capite*. The land in question was held of the said manor in socage. The Duchy and this manor parcel thereof descended to King Henry IV. King Henry VIII. by letters patent the 19th of his reign, granted this manor to Anthony Low, grandfather of the ward, and then tenant of the land in question, reserving 26*l.* 10*s.* rent and fealty, *tantum pro omnibus servitiis*, and this patent is under the Duchy-seal only. The question is, how this tenancy is held, whether *in capite*, or in socage.

The case resteth upon a point, unto which all the questions arising are to be reduced.

The first is, whether this tenancy, being by the grant of the King of the manor to the tenant grown to an unity of possession with the manor, be held as the manor is held, which is expressed in the patent to be in socage.

The second, whether the manor itself be held in socage according to the last reservation; or *in capite* by revivor of the ancient seigniory, which was *in capite* before the Duchy came to the crown.

Therefore my first proposition is, that this tenancy, which without all colour is no parcel of the manor, cannot be comprehended within the tenure reserved upon the manor, but that the law createth a several and distinct tenure thereupon, and that not guided

according to the express tenure of the manor, but merely *secundum normam legis*, by the intendment and rule of law, which must be a tenure by knight's service *in capite*.

And my second proposition is, that admitting that the tenure of the tenancy should ensue the tenure of the manor; yet nevertheless the manor itself, which was first held of the crown *in capite*, the tenure suspended by the conquest of the Duchy to the crown, being now conveyed out of the crown under the Duchy-seal only, which hath no power to touch or carry any interest, whereof the King was vested in right of the crown, is now so severed and disjoined from the ancient seigniory, which was *in capite*, as the same ancient seigniory is revived, and so the new reservation void; because the manor cannot be charged with two tenures.

The King's tenures may take more hurt by a resolution in law, than by many suppressions or concealments.

This case concerneth one of the greatest and fairest flowers of the crown, which is the King's tenures, and that in their creation; which is more than their preservation: for if the rules and maxims of law in the first raising of tenures *in capite* be weakened, this nips the flower in the bud, and may do more hurt by a resolution in law, than the losses, which the King's tenures do daily receive by oblivion or suppression, or the neglect of officers, or the iniquity of jurors, or other like blasts, whereby they are continually shaken: and therefore it behoveth us of the King's council to have a special care of this case, as much as in us is, to give satisfaction to the court. Therefore before I come to argue these two points particularly, I will speak something of the favour of law towards tenures *in capite*, as that which will give a force and edge to all that I shall speak afterwards.

No land in the kingdom of England charged by way of tribute, and all land charged by way of tenure.

The constitution of this kingdom appeareth to be a free monarchy in nothing better than in this; that as there is no land of the subject that is charged to the crown by way of tribute, or tax, or talliage, except it be set by parliament: so on the other side there is no land of the subject, but is charged to the crown by tenure, mediate or immediate, and that by the grounds

of the common law. This is the excellent temper and commixture of this estate, bearing marks of the sovereignty of the King, and of the freedom of the subject from tax, whose possessions are *feodalia*, not *tributaria*.

Tenures, according to the most general division, are of two natures, the one containing matter of protection, and the other matter of profit: that of protection is likewise double, divine protection and military. The divine protection is chiefly procured by the prayers of holy and devout men; and great pity it is, that it was depraved and corrupted with superstition. This begot the tenure in frankalmoigne, which though in burden it is less than in socage, yet in virtue it is more than knight's service. For we read how, during the while Moses in the mount held up his hands, the Hebrews prevailed in battle; as well as when Elias prayed, rain came after drought, which made the plough go; so that I hold the tenure in frankalmoigne in the first institution indifferent to knight's service and socage. Setting apart this tenure, there remain the other two, that of knight's service, and that of socage; the one tending chiefly to defence and protection, the other to profit and maintenance of life. They are all three comprehended in the ancient verse, *Tu semper ora, tu protege, tuque labora.* But between these two services, knight's service and socage, the law of England makes a great difference: for this kingdom, my lords, is a state neither effeminate, nor merchant-like; but the laws give the honour unto arms and military service, like the laws of a nation, before whom Julius Cæsar turned his back, as their own prophet says; *Territa quæsitis ostendit terga Britannis.* And therefore howsoever men, upon husband-like considerations of profit, esteem of socage tenures; yet the law, that looketh to the greatness of the kingdom, and proceedeth upon considerations of estate, giveth the preeminence altogether to knight's service.

We see that the ward, who is ward for knight's service land, is accounted in law disparaged, if he be tendered a marriage of the burghers parentage: and we

see that the knights fees were by the ancient laws the materials of all nobility: for that it appears by divers records how many knights fees should by computation go to a barony, and so to an earldom. Nay, we see that in the very summons of parliament, the knights of the shire are required to be chosen *milites gladio cincti;* so as the very call though it were to council bears a mark of arms and habiliments of war. To conclude, the whole composition of this warlike nation, and the favours of law, tend to the advancement of military virtue and service.

But now farther, amongst the tenures by knight's service, that of the King *in capite* is the most high and worthy: and the reason is double; partly because it is held of the King's crown and person; and partly because the law createth such a privity between the line of the crown and the inheritors of such tenancies, as there cannot be an alienation without the King's licence, the penalty of which alienation was by the common law the forfeiture of the state itself, and by the statute of E. III. is reduced to fine and seisure. And although this also has been unworthily termed by the vulgar, not *capite*, captivity and thraldom; yet that which they count bondage, the law counteth honour, like to the case of tenants in tail of the King's advancement, which is a great restraint by the statute of 34 H. VIII. but yet by that statute it is imputed for an honour. This favour of law to the tenure by knight's service *in capite* produceth this effect, that wheresoever there is no express service effectually limited, or wheresoever that, which was once limited, faileth, the law evermore supplieth a tenure by knight's service *in capite;* if it be a blank once—that the law must fill it up, the law ever with her own hand writes, tenure by knight's service *in capite.* And therefore the resolution was notable by the judges of both benches, that where the King confirmed to his farmers tenants for life, *tenend' per servitia debita*, this was a tenure *in capite:* for other services are *servitia requisita*, required by the words of patents or grants; but that only is *servitium debitum*, by the rules of law.

44 E. 3. f. 45.

The course therefore that I will hold in the proof of the first main point, shall be this. First I will shew, maintain, and fortify my former grounds, that wheresoever the law createth the tenure of the King, the law hath no variety, but always raiseth a tenure *in capite*.

Secondly, that in the case present, there is not any such tenure expressed, as can take place, and exclude the tenure in law, but that there is as it were a lapse to the law.

And lastly, I will shew in what cases the former general rule receiveth some shew of exception; and will shew the difference between them and our case; wherein I shall include an answer to all that hath been said on the other side.

For my first proposition I will divide into four branches: first, I say, where there is no tenure reserved, the law createth a tenure *in capite;* secondly, where the tenure is uncertain; thirdly, where the tenure reserved is impossible or repugnant to law; and lastly, where a tenure once created is afterwards extinct.

For the first, if the King give lands and say nothing of the tenure; this is a tenure *in capite;* nay, if the King give whiteacre, and blackacre, and reserves a tenure only of whiteacre, and that a tenure expressed to be in socage; yet you shall not for fellowship sake, because they are in one patent, intend the like tenure of blackacre; but that shall be held *in capite.*

Per Prisot in fine 33 H. 6. f. 7. 8 H. 7. f. 3. b.

So if the King grant land, held as of a manor, with warranty, and a special clause of recompense, and the tenant be impleaded, and recover in value, this land shall be held *in capite,* and not of the manor.

So if the King exchange the manor of Dale for the manor of Sale, which is held in socage, although it be by the word *excambium;* yet that goeth to equality of the state, not of the tenure, and the manor of Dale, if no tenure be expressed, shall be held *in capite.* So much for silence of tenure.

For the second branch, which is incertainty of tenure; first, where an *ignoramus* is found by office,

this by the common law is a tenure *in capite*, which is most for the King's benefit; and the presumption of law is so strong, that it amounts to a direct finding or affirmative, and the party shall have a negative or traverse, which is somewhat strange to a thing indefinite.

5 Mar. Dyer. 14 Eliz. Dyer. 306.

So if in ancient time, one held of the King, as of a manor by knight's service, and the land return to the King by attainder, and then the King granteth it *tenend' per fidelitatem tantum*, and it returneth the second time to the King, and the King granteth it *per servitia antehac consueta*; now because of the incertainty neither service shall take place, and the tenure shall be *in capite*, as was the opinion of you, my lord chief justice, where you were commissioner to find an office after Austin's death.

Austin's office.

So if the King grant land *tenend' de manerio de Eastgreenwich vel de honore de Hampton*; this is void for the non-certainty, and shall be held of the King *in capite*.

33 H.6.f.7. For the third branch, if the King limit land to be discharged of tenure, as *absque aliquo inde reddendo*, this is a tenure *in capite*; and yet if one should go to the next, *ad proximum*, it should be a socage, for the least is next to none at all: but you may not take the King's grant by argument; but where they cannot take place effectually and punctually, as they are expressed, there you shall resort wholly to the judgment of the law.

14 H.6.f.12. So if the King grant land *tenend' si frankment come il en son corone*, this is a tenure *in capite*.

Merefeild's case. If land be given to be held of a lordship not capable, as of Salisbury plain, or a corporation not *in esse*, or of the manor of a subject, this is a tenure *in capite*.

So if land be given to hold by impossible service, as by performing the office of the sheriff of Yorkshire, which no man can do but the sheriff, and fealty for all service, this is a tenure *in capite*.

For the fourth branch, which cometh nearest to our case; let us see where a seigniory was once, and is after extinguished; this may be in two manners, by

release in fact, or by unity of profession, which is a release or discharge in law.

And therefore let the case be, that the King releaseth to his tenant that holds of him in socage; this release is good, and the tenant shall hold now *in capite*, for the former tenure being discharged, the tenure in law ariseth. *Vide* 30 H. 8. Dyer. 8 H. 7. f. 13.

So the case, which is in 1 E. III. a fine is levied to J. S. in tail, the remainder ouster to the King, the state tail shall be held *in capite*, and the first tenancy, if it were in socage, by the unity of the tenancy, shall be discharged, and a new raised thereupon: and therefore the opinion, or rather the *query* in Dyer no law. 1 E. 3. f. 4. fine accept.

Thus much for my major proposition; now for the minor, or the assumption, it is this: first, that the land in question is discharged of tenure by the purchase of the manor; then that the reservation of the service upon the manor cannot possibly inure to the tenancy; and then if a corruption be of the first tenure, and no generation of the new; then cometh in the tenure *per normam legis*, which is *in capite*. 4 et 5 P. M.

And the course of my proof shall be *ab enumeratione partium*, which is one of the clearest and most forcible kinds of argument.

If this parcel of land be held by fealty and rent *tantum*, either it is the old fealty before the purchase of the manor, or it is the new fealty reserved and expressed upon the grant of the manor; or it is a new fealty raised by intendment of law in conformity and congruity of the fealty reserved upon the manor; but none of these, *ergo*, etc.

That it should be the old fealty, is void of sense; for it is not *ad eosdem terminos*. The first fealty was between the tenancy and the manor, that tenure is by the unity extinct. Secondly, that was a tenure of a manor, this is a tenure in gross. Thirdly, the rent of 26*l.* 10*s.* must needs be new, and will you have a new rent with an old fealty? These things are *portenta in lege*; nay I demand, if the tenure of the tenancy, Low's tenure, had been by knight's service, would you have said that had remained? No, but that it

was altered by the new reservation; *ergo*, no colour of the old fealty.

That it cannot be the new fealty is also manifest; for the new reservation is upon the manor, and this is no part of the manor: for if it had escheated to the King in an ordinary escheat, or come to him upon a mortmain, in these cases it had come in lieu of the seigniory, and been parcel of the manor, and so within the reservation, but clearly not upon a purchase in fact.

Again, the reservation cannot inure, but upon that which is granted; and this tenancy was never granted, but was in the tenant before; and therefore no colour it should come under the reservation. But if it be said, that nevertheless the seigniory of that tenancy was parcel of the manor, and is also granted; and although it be extinct in substance, yet it may be *in esse* as to the King's service: this deserveth answer: for this assertion may be colourably inferred out of Carr's case.

9 Eliz. Coke, Lib. 3. f. 30.

King Edw. VI. grants a manor, rendring 94*l.* rent in fee farm *tenendum de Eastgreenwich* in socage; and after, Queen Mary granteth these rents amongst other things *tenendum in capite*, and the grantee released to the heir of the tenant; yet the rent shall be *in esse*, as to the King, but the land, saith the book, shall be deviseable by the statute for the whole, as not held *in capite*.

25 Ass. pl. 60.

And so the case of the honour of Pickeringe, where the King granted the bailywick rendring rent; and after granted the honour, and the bailywick became forfeited, and the grantee took forfeiture thereof, whereby it was extinct; yet the rent remaineth as to the King out of the bailywick extinct.

These two cases partly make not against us, and partly make for us: there be two differences that avoid them. First, there the tenures or rents are *in esse* in those cases for the King's benefit, and here they should be *in esse* to the King's prejudice, who should otherwise have a more beneficial tenure. Again, in these

cases the first reservation was of a thing *in esse*, at the time of the reservation; and then there is no reason the act subsequent of the King's tenant should prejudice the King's interest once vested and settled: but here the reservation was never good, because it is out of a thing extinct in the instant.

But the plain reason which turneth Carr's case mainly for us, is; for that where the tenure is of a rent or seigniory, which is afterwards drowned or extinct in the land; yet the law judgeth the same rent or seigniory to be *in esse*, as to support the tenure: but of what? Only of the said rent or seigniory, and never of the land itself; for the land shall be held by the same tenure it was before. And so is the rule of Carr's case, where it is adjudged, that though the rent be held *in capite*, yet the land was nevertheless deviseable for the whole, as no ways charged with that tenure.

Why then, in our case, let the fealty be reserved out of the seigniory extinct, yet that toucheth not at all the land: and then of necessity the land must be also held; and therefore you must seek out a new tenure for the land, and that must be *in capite*.

And let this be noted once for all, that our case is not like the common cases of a menalty extinct, where the tenant shall hold of the lord, as the mean held before; as where the menalty is granted to the tenant, or where the tenancy is granted to the mean, or where the menalty descendeth to the tenant, or where the menalty is forejudged. In all these cases the tenancy, I grant, is held as the menalty was held before, and the difference is because there was an old seigniory in being; which remaineth untouched and unaltered, save that it is drawn a degree nearer to the land, so as there is no question in the world of a new tenure; but in our case there was no lord paramount, for the manor itself was in the crown, and not held at all, nor no seigniory of the manor *in esse;* so as the question is wholly upon the creation of a new seigniory, and not upon the continuance of an old.

For the third course, that the law should create a

new distinct tenure by fealty of this parcel, guided by the express tenure upon the manor; it is the probablest course of the three: but yet if the former authorities, I have alledged, be well understood and marked, they shew the law plainly, that it cannot be; for you shall ever take the King's grant *ad idem* and not *ad simile*, or *ad proximum:* no more than in the case of the *absque aliquo reddendo*, or as free as the crown; who would not say that in those cases it should amount to a socage tenure? for *minimum est nihilo proximum:* and yet they are tenures by knight's service *in capite*. So if the King by one patent pass two acres, and a fealty reserved but upon the one of them, you shall not resort to this *ut expressum servitium regat, vel declaret tacitum*. No more shall you in our case imply that the express tenure reserved upon the manor shall govern, or declare the tenure of the tenancy, or control the intendment of law concerning the same.

Now will I answer the cases, which give some shadow on the contrary side, and shew they have their particular reasons, and do not impugn our case.

First, if the King have land by attainder of treason, and grant the land to be held of himself, and of other lords, this is no new tenure *per normam legis communis;* but the old tenure *per normam statuti*, which taketh away the intendment of the common law; for the statute directeth it so, and otherwise the King shall do a wrong.

So if the King grant land parcel of the demesne of a manor *tenendum de nobis*, or reserving no tenure at all, this is a tenure of the manor or of the honour, and not *in capite:* for here the more vehement presumption controlleth the less; for the law doth presume the King hath no intent to dismember it from the manor, and so to lose his court and the perquisites.

25 H. 6. f. 56. 9. So if the King grant land *tenendum* by a rose *pro omnibus servitiis:* this is not like the cases of the *absque aliquo inde reddendo*, or as free as the crown: for *pro omnibus servitiis* shall be intended for all express service: whereas fealty is incident, and passeth tacit, and so it is no impossible or repugnant reservation.

The case of the frankalmoigne, I mean the case where the King grants lands of the Templers to J. S. to hold as the Templers did, which cannot be frankalmoigne; and yet hath been ruled to be no tenure by knight's service *in capite,* but only a socage tenure, is easily answered; for that the frankalmoigne is but a *species* of a tenure in socage with a privilege, so the privilege ceaseth, and the tenure remains.

This is no frankalmoigne.

Wood's case.

To conclude therefore, I sum up my arguments thus. My major is, where *calamus legis* doth write the tenure, it is knight's service *in capite.* My minor is, this tenure is left to the law; *ergo* this tenure is *in capite.*

For the second point, I will first speak of it according to the rules of the common law, and then upon the statutes of the duchy.

First I do grant, that where a seigniory and a tenancy, or a rent and land, or trees and land, or the like primitive and secondary interest are conjoined in one person, yea though it be in *autre droit;* yet if it be of like perdurable estate, they are so extinct, as by act in law they may be revived, but by grant they cannot.

For if a man have a seigniory in his own right, and the land descend to his wife, and his wife dieth without issue, the seigniory is revived; but if he will make a feoffment in fee, saving his rent, he cannot do it. But there is a great difference, and let it be well observed, between *autre capacitie* and *autre droit;* for in case of *autre capacitie* the interests are *contigua,* and not *continua,* conjoined, but not confounded. And therefore if the master of an hospital have a seigniory, and the mayor and commonalty of St. Albans have a tenancy, and the master of the hospital be made mayor, and the mayor grant away the tenancy under the seal of the mayor and commonalty, the seigniory of the hospital is revived.

So between natural capacity and politic, if a man have a seigniory to him and his heirs, and a bishop is tenant, and the lord is made bishop, and the bishop before the statute grants away the land under the chapter's seal, the seigniory is revived.

The same reason is between the capacity of the crown and the capacity of the duchy, which is in the King's natural capacity, though illustrated with some privileges of the crown; if the King have the seigniory in the right of his crown, and the tenancy in the right of the duchy, as our case is, and make a feoffment of the tenancy, the tenure must be revived; and this is by the ground of the common law. But the case is the more strong by reason of the statute of 1 H. IV. 3 H. V. and 1 H. VII. of the duchy, by which the duchy-seal is enabled to pass lands of the duchy, but no ways to touch the crown: and whether the King be in actual possession of the thing that should pass, or have only a right, or a condition, or a thing in suspense, as our case is, all is one; for that seal will not extinguish so much as a spark of that which is in the right of the crown; and so a plain revivor.

And if it be said that a mischief will follow; for that upon every duchy patent men shall not know how to hold, because men must go back to the ancient tenure, and not rest in the tenure limited: for this mischief there grows an easy remedy, which likewise is now in use, which is to take both seals, and then all is safe.

Secondly, as the King cannot under the duchy-seal grant away his ancient seigniory in the right of his crown; so he cannot make any new reservation by that seal, and so of necessity it falleth to the law to make the tenure: for every reservation must be of the nature of that that passeth, as a dean and chapter cannot grant land of the chapter, and reserve a rent to the dean and his heirs, nor *e converso:* nor no more can the King grant land of the duchy under that seal, and reserve a tenure to the crown: and therefore it is warily put in the end of the case of the duchy in the commentaries, where it is said, if the King make a feoffment of the duchy land, the feoffee shall hold *in capite;* but not a word of that it should be by way of express reservation, but upon a feoffment simply, the law shall work it and supply it.

To conclude, there is direct authority in the point but that it is *via versa;* and it was the bishop of Sa-

lisbury's case: The King had in the right of the duchy a rent issuing out of land, which was monastery land, which he had in the right of the crown, and granted away the land under the great seal to the bishop; and yet nevertheless the rent continued to the duchy, and so upon great and grave advice it was in the duchy decreed: so as your lordship seeth, whether you take the tenure of the tenancy, or the tenure of the manor, this land must be held *in capite*. And therefore, *etc.*

THE

CASE

OF

REVOCATION OF USES.

IN THE KING'S BENCH.

The Case shortly put, without names or dates more than of necessity, is this.

SIR John Stanhope conveys the manor of Burrough-ash to his lady for part of her jointure, and intending, as is manifest, not to restrain himself, nor his son, from disposing some proportion of that land according to their occasions, so as my lady were at no loss by the exchange, inserteth into the conveyance a power of revocation and alteration in this manner; provided that it shall be lawful for himself and his son successively to alter and make void the uses, and to limit and appoint new uses, so it exceed not the value of 20*l.* to be computed after the rents then answered: and that immediately after such declaration, or making void, the feoffees shall stand seised to such new uses; *Ita quod* he or his son, within six months after such declaration, or making void, shall assure, within the same town, *tantum terrarum et tenementorum, et similis valoris,* as were so revoked, to the uses expressed in the first conveyance.

Sir John Stanhope his son revokes the land in Burrough-ash, and other parcels not exceeding the value of 20*l.* and within six months assures to my lady and to the former uses Burton-joice and other lands; and the jury have found that the lands revoked contain twice so much in number of acres, and twice so much in yearly value, as the new lands, but yet that the new lands are rented at 21*l.* and find the lands of Burrough-

ash, now out of lease formerly made: and that no notice of this new assurance was given before the ejectment, but only that Sir John Stanhope had by word told his mother, that such an assurance was made, not shewing or delivering the deed.

The question is, Whether Burrough-ash be well revoked? Which question divides itself into three points.

First, whether the *ita quod* be a void and idle clause? for if so, then there needs no new assurance, but the revocation is absolute *per se*.

The next is, if it be an effectual clause, whether it be pursued or no? wherein the question will rest, whether the value of the re-assured lands shall be only computed by rents?

And the third is, if in other points it should be well pursued, yet whether the revocation can work until a sufficient notice of the new assurance?

And I shall prove plainly, that *ita quod* stands well with the power of revocation; and if it should fall to the ground, it draws all the rest of the clause with it, and makes the whole void, and cannot be void alone by itself.

I shall prove likewise that the value must needs be accounted not a tale value, or an arithmetical value by the rent, but a true value in quantity and quality.

And lastly, that a notice is of necessity, as this case is.

I will not deny, but it is a great power of wit to make clear things doubtful; but it is the true use of wit to make doubtful things clear, or at least to maintain things that are clear, to be clear, as they are. And in that kind I conceive my labour will be in this case, which I hold to be a case rather of novelty than difficulty, and therefore may require argument, but will not endure much argument: but to speak plainly to my understanding, as the case hath no equity in it, I might say piety, so it hath no great doubt in law.

First therefore this it is, that I affirm, that the clause, *so that*, *ita quod*, containing the recompense, governs the clause precedent of the power, and that it makes

it wait and expect otherwise than as by way of inception, but the effect and operation is suspended, till that part also be performed: and if otherwise, then I say plainly, you shall not construe by fractions; but the whole clause and power is void, not *in tanto*, but *in toto*. Of the first of them I will give four reasons.

The first reason is, that the wisdom of the law useth to transpose words according to the sense; and not so much to respect how the words do take place, but how the acts, which are guided by those words, may take place.

Hill and Graunger's case, com. f. 171.

Hill and Graunger's case comment. 171. A man in August makes a lease rendering 10*l.* rent yearly to be paid at the feasts of Annunciation and Michaelmas; these words shall be inverted by law, as if they had been set thus, at Michaelmas and the Annunciation: for else he cannot have a rent yearly; for there will be fourteen months to the first year.

Fitz-Williams's case, 2 Jac. Co. p. 6. f. 33.

Fitz-Williams's case, 2 Jac. Co. p. 6. f. 33. it was contained in an indenture of uses, that Sir William Fitz-Williams should have power to alter and change, revoke, determine, and make void the uses limited: the words are placed disorderly; for it is in nature first to determine the uses, and after to change them by limitation of new. But the chief question being in the book, whether it might be done by the same deed; it is admitted and thought not worth the speaking to, that the law shall marshal the acts against the order of the words, that is, first to make void, then to limit.

So if I convey land and covenant with you to make farther assurance, so that you require it of me, there though the request be placed last, yet it must be acted first.

So if I let land to you for a term, and say farther, it shall be lawful for you to take twenty timber-trees to erect a new tenement upon the land, so that my bailiff do assign you where you shall take them; here the assignment, though last placed, must precede. And therefore the Grammarians do infer well upon the word

period, which is a full and complete clause or sentence, that it is *complexus orationis circularis :* for as in a circle there is not *prius* nor *posterius*, so in one sentence you shall not respect the placing of words ; but though the words lie in length, yet the sense is round, so as *prima erunt novissima, et novissima prima.* For though you cannot speak all at once so, yet you must construe and judge upon all at once.

To apply this; I say these words, *so that*, though *loco et textu posteriora*, yet they be *potestate et sensu priora:* as if they had been penned thus, that it shall be lawful for Sir Thomas Stanhope, so that he assure lands, *etc.* to revoke ; and what difference between, so that he assure, he may revoke ; or, he may revoke, so that he assure : for you must either make the *so that* to be precedent or void. as I shall tell you anon. And therefore the law will rather invert the words, than pervert the sense.

But it will be said, that in the cases I put, it is left indefinite, when the act last limited shall be performed ; and so the law may marshal it, as it may stand with possibility ; and so if it had been in this case no more but, *so that* Sir Thomas or John should assure new lands, and no time spoken of, the law might have intended it precedent. But in this case it is precisely put to be at any time within six months after the declaration, and therefore you cannot vary in the times.

To this I answer, that the new assurance must be in deed in time after the instrument or deed of the declaration ; but, on the other side, it must be time precedent to the operation of the law, by determining the uses thereupon : so as it is not to be applied so much to the declaration itself, but to the warrant of the declaration. It shall be lawful, so that, *etc.* And this will appear more plainly by my second reason, to which now I come; for as for the cavillation upon the word *immediately*, I will speak to it after.

My second reason therefore is out of the use and signification of this conjunction or bond of speech, *so that :* for no man will make any great doubt of it, if

the words had been *si*, if Sir Thomas shall within six months of such declaration convey; but that it must have been intended precedent; yet if you mark it well, these words *ita quod* and *si*, howsoever in propriety the *ita quod* may seem subsequent, and the *si* precedent, yet they both bow to the sense.

4 E. 6. Pl. Com. Colthurst's case.

So we see in 4 Edw. VI. Colthurst's case, a man leaseth to J. S. a house, *si ipse vellet habitare, et residens esse;* there the word *si* amounts to a condition subsequent; for he could not be resident before he took the state; and so *via versa* may *ita quod* be precedent, for else it must be idle or void. But I go farther, for I say *ita quod*, though it be good words of condition, yet more properly it is neither condition, precedent, nor subsequent, but rather a qualification, or form, or adherent to the acts, whereto it is joined, and made part of their essence, which will appear evidently by other cases. For allow it had been thus, *so that the deed of declaration be inrolled* within six months, this is all one, as by deed inrolled within six months, as it is said in Digg's case, 42 Eliz. f. 173. that by deed indented to be inrolled is all one with deed indented and inrolled. It is but a *modus faciendi*, a description, and of the same nature is the *ita quod:* so if it had been thus, it shall be lawful for Sir Thomas to declare, so that the declaration be with the consent of my lord chief justice, is it not all one with the more compendious form of penning, that Sir Thomas shall declare with the consent of my lord chief justice? And if it had been thus, so that Sir John within six months after such declaration shall obtain the consent of my lord chief justice, should not the uses have expected? But these you will say are forms and circumstances annexed to the conveyance required: why surely any collateral matter coupled by the *ita quod* is as strong? If the *ita quod* had been, that Sir John Stanhope within six months should have paid my lady 1000*l.* or entered into bond never more to disturb her, or the like, all these make but one intire idea or notion, how that his power should not be categorical, or simple at pleasure, but hypothetical, and qualified, and restrained, that is to

Digg's case, 42 Eliz. Co. P. 1. f. 173.

say, not the one without the other, and they are parts incorporated into the nature and essence of the authority itself.

The third reason is the justice of the law in taking words so, as no material part of the parties intent perish: for, as one saith, *præstat torquere verba quam homines*, better wrest words out of place, than my lady Stanhope out of her jointure, that was meant to her. And therefore it is elegantly said in Fitz-Williams's case, which I vouched before, though words be contradictory, and, to use the phrase of the book, *pugnant tanquam ex diametro;* yet the law delighteth to make atonement, as well between words as between parties, and will reconcile them so as they may stand, and abhorreth a *vacuum*, as well as nature abhorreth it; and as nature to avoid a *vacuum* will draw substances contrary to their propriety, so will the law draw words. Therefore saith Littleton, if I make a feoffment *reddendo* rent to a stranger, this is a condition to the feoffor, rather than it shall be void, which is quite cross; it sounds a rent, it works a condition, it is limited to a third person, it inureth to the feoffor; and yet the law favoureth not conditions, but to avoid a *vacuum*.

So in the case of 45 E. III. a man gives land in frank-marriage, the remainder in fee. The frank-marriage is first put, and that can be but by tenure of the donor; yet rather than the remainder should be void, though it be last placed, the frank-marriage being but a privilege of estate shall be destroyed. 45 E. 3.

So 33 H. VI. Tressham's case: the King granteth a wardship, before it fall; good, because it cannot inure by covenant, and if it should not be good by plea, as the book terms it, it were void; so that, no, not in the King's case, the law will not admit words to be void.

So then the intent appears most plainly, that this act of Sir John should be *actus geminus*, a kind of twine to take back, and to give back, and to make an exchange, and not a resumption; and therefore upon a conceit of repugnancy, to take the one part, which is the privation of my lady's jointure, and not the other, which is the restitution or compensation, were

a thing utterly injurious in matter, and absurd in construction.

The fourth reason is out of the nature of the conveyance, which is by way of use, and therefore ought to be construed more favourably according to the intent, and not literally or strictly: for although it be said in Frene and Dillon's case, and in Fitz-Williams's case, that it is safe so to construe the statute of 27 H. VIII. as that uses may be made subject to the rules of the common law, which the professors of the law do know, and not leave them to be extravagant and irregular; yet if the late authorities be well marked, and the reason of them, you shall find this difference, that uses in point of operation are reduced to a kind of conformity with the rules of the common law, but that in point of exposition of words, they retain somewhat of their ancient nature, and are expounded more liberally according to the intent; for with that part the statute of 27 doth not meddle. And therefore if the question be, whether a bargain and sale upon condition be good to reduce the state back without an entry? or whether if a man make a feoffment in fee to the use of John a Style for years, the remainder to the right heirs of John a Downe, this remainder be good or no? these cases will follow the grounds of the common law for possessions, in point of operation; but so will it not be in point of exposition.

For if I have the manor of Dale and the manor of Sale lying both in Vale, and I make a lease for life of them both, the remainder of the manor of Dale, and all other my lands in Vale to John a Style, the remainder of the manor of Sale to John a Downe, this latter remainder is void, because it comes too late, the general words having carried it before to John a Style. But put it by way of use a man makes a feoffment in fee of both manors, and limits the use of the manor of Dale, and all other the lands in Vale, to the use of himself, and his wife for her jointure, and of the manor of Sale to the use of himself alone. Now his wife shall have no jointure in the manor of Sale, and so was it judged in the case of the manor of Odiam.

The case of the manor of Odiam.

And therefore our case is more strong, being by way of use, and you may well construe the latter part to control and qualify the first, and to make it attend and expect: nay, it is not amiss to see the case of Peryman 41 Eliz. Coke p. 5. f. 84. where by a custom a livery may expect; for the case was, that in the manor of Portchester, the custom was, that a feoffment of land should not be good, except it were presented within a year in the court of the manor, and there ruled that it was but *actus inchoatus*, till it was presented; now if it be not merely against reason of law, that so solemn a conveyance as livery, which keeps state, I tell you, and will not wait, should expect a farther perfection, *a fortiori* may a conveyance in use or declaration of use receive a consummation by degrees, and several acts. And thus much for the main point.

41 Eliz. Co. p. 5. f. 84.

Now for the objection of the word *immediate*, it is but light and a kind of sophistry. They say that the words are, that the uses shall rise immediately after the declaration, and we would have an interposition of an act between, namely, that there should be a declaration first, then a new assurance within the six months; and lastly, the uses to rise: whereunto the answer is easy; for we have shewed before, that the declaration and the new assurance are in the intent of him that made the conveyance, and likewise in eye of law, but as one compounded act. So as *immediately after the declaration* must be understood of a perfect and effectual declaration, with the adjuncts and accouplements expressed.

So we see in 49 E. III. f. 11. if a man be attainted of felony, that holds lands of a common person, the King shall have his year, day and waste: but when? Not before an office found: and yet the words of the statute of *prærogativa regis* are, *rex habebit catalla felonum, et si ipsi habent liberum tenementum, statim capiatur in manus domini, et rex habebit annum, diem et vastum:* and here the word *statim* is understood of the effectual and lawful time, that is, after office found.

49 E. 3. f. 11.

2 H. 4. f. 17. So in 2 H. IV. f. 17. it appears that by the statute of Acton Burnell, if the debt be acknowledged, and the day past that the goods of the debtors shall be sold *statim*, in French *maintenant;* yet nevertheless this *statim* shall not be understood, before the process of law requisite passed, that is, the day comprised in the extent.

27 H. 8. f. 19. So it is said 27 H. VIII. f. 19. by Audley the chancellor, that the present tense shall be taken for the future; *a fortiori*, say I, the immediate future tense may be taken for a distant future tense; as if I be bound that my son being of the age of twenty one years shall marry your daughter, and that he be now of twelve years; yet this shall be understood, when he shall be of the age of twenty one years. And so in our case *immediately after the declaration* is intended when all things shall be performed, that are coupled with the said declaration.

But in this I doubt I labour too much; for no man will be of opinion, that it was intended that the lady Stanhope should be six whole months without either the old jointure or the new; but that the old should expect until the new were settled without any *interim*. And so I conclude this course of atonements, as Fitz-Williams's case calls it, whereby I have proved, that all the words, by a true marshalling of the acts, may stand according to the intent of the parties.

I may add *tanquam ex abundanti*, that if both clauses do not live together, they must both die together; for the law loves neither fractions of estates, nor fractions of constructions; and therefore in Jermin and Askew's case, 37 Eliz. a man did devise lands in tail with proviso, that if the devisee did attempt to alien, his estate should cease, as if he were naturally dead. Is it said there, that the words, *as if he were naturally dead*, shall be void, and the words, *that his estate shall cease*, good? No, but the whole clause shall be void. And it is all one reason of a *so that*, as of an *as if*, for they both suspend the sentence.

Jermin and Askew's case.

So if I make a lease for life, upon condition he shall not alien, nor take the profits, shall this be good for

the first part, and void for the second? No, but it shall be void for both.

So if the power of declaration of uses had been thus penned, that Sir John Stanhope might by his deed indented declare new uses, so that the deed were inrolled before the mayor of St. Albans, who hath no power to take inrollments; or so that the deed were made in such sort, as might not be made void by parliament: in all these and the like cases the impossibility of the last part doth strike upwards, and infect, and destroy the whole clause. And therefore, that all the words may stand, is the first and true course; that all the words be void, is the second and probable; but that the revoking part should be good, and the assuring part void, hath neither truth nor probability.

Now come I to the second point, how this value should be measured, wherein methinks you are as ill a measurer of values, as you are an expounder of words; which point I will divide, first considering what the law doth generally intend by the word *value;* and secondly to see what special words may be in these clauses, either to draw it to a value of a present arrentation, or to understand it of a just and true value.

The word *value* is a word well known to the law, and therefore cannot be, except it be willingly, misunderstood. By the common law there is upon a warranty a recovery in value. I put the case therefore that I make a feoffment in fee with warranty of the manor of Dale, being worth 20*l.* *per annum,* and then in lease for 20*s.* The lease expires, for that is our case, though I hold it not needful, the question is, whether upon an eviction there shall not be recovered from me land to the value of 20*l.*

So if a man give land in frank-marriage then rented at 40*l.* and no more worth; there descendeth other lands, lett perhaps for a year or two for 20*l.* but worth 80*l.* shall not the donee be at liberty to put this land in hotchpotch?

So if two parceners be in tail, and they make partition of lands equal in rent, but far unequal in value, shall this bind their issues? By no means; for there is

no calendar so false to judge of values as the rent, being sometimes improved, sometimes ancient, sometimes where great fines have been taken, sometimes where no fines; so as in point of recompense you were as good put false weights into the hands of the law, as to bring in this interpretation of value by a present arrentation. But this is not worth the speaking to in general; that which giveth colour is the special words in the clause of revocation, that the 20*l.* value should be according to the rents then answered; and therefore that there should be a correspondence in the computation likewise of the recompense. But this is so far from countenancing that exposition, as, well noted, it crosseth it; for *opposita juxta se posita magis elucescunt:* first, it may be the intent of Sir Thomas, in the first clause, was double, partly to exclude any land in demesne, partly knowing the land was double, and as some say quadruple, better than the rent, he would have the more scope of revocation under his 20*l.* value.

But what is this to the clause of recompense? first, are there any words *secundum computationem prædictam?* There are none. Secondly, doth the clause rest upon the words *similis valoris?* No, but joineth *tantum et similis valoris:* confound not predicaments; for they are the mere-stones of reason. Here is both quantity and quality; nay he saith farther, within the same towns. Why, marry, it is somewhat to have mens possessions lie about them, and not dispersed. So it must be as much, as good, as near; so plainly doth the intent appear, that my lady should not be a loser.

[For the point of the notice, it was discharged by the court.]

THE

JURISDICTION OF THE MARCHES.

The effect of the first argument of the King's Solicitor-general, in maintaining the jurisdiction of the Council of the Marches over the four Shires.

THE question for the present is only upon the statute of 32 H. VIII, and though it be a great question, yet it is contracted into small room; for it is but a true construction of a monosyllable, the word *march.*

The exposition of all words resteth upon three proofs, the propriety of the word, and the matter precedent, and subsequent.

Matter precedent concerning the intent of those that speak the words, and matter subsequent touching the conceit and understanding of those that construe and receive them.

First therefore as to *vis termini,* the force and propriety of the word; this word *marches* signifieth no more but limits, or confines, or borders, in Latin *limites,* or *confinia,* or *contermina;* and thereof was derived at the first *marchio,* a marquiss, which was *comes limitaneus.*

Now these limits cannot be *linea imaginaria,* but it must have some contents and dimension, and that can be no other but the counties adjacent: and for this construction we need not wander out of our own state, for we see the counties of Northumberland, Cumberland, and Westmoreland, lately the borders upon Scotland. Now the middle shires were commonly called the east, west, and middle *marches.*

To proceed therefore to the intention of those that made the statute, in the use of this word; I shall prove that the parliament took it in this sense by three several arguments.

The first is, that otherwise the word should be idle; and it is a rule, *verba sunt accipienda, ut sortientur effectum:* for this word *marches*, as is confessed on the other side, must be either for the counties marches, which is our sense, or the lordships marchers, which is theirs; that is, such lordships, as by reason of the incursions and infestation of the Welsh, in ancient time, were not under the constant possession of either dominion, but like the bateable ground where the war played. Now if this latter sense be destroyed, then all equivocation ceaseth.

That it is destroyed, appears manifestly by the statute of 27 H. VIII. made seven years before the statute of which we dispute: for by that statute all the lordships marchers are made shire ground, being either annexed to the ancient counties of Wales, or to the ancient counties of England, or erected into new counties, and made parcel of the dominion of Wales, and so no more marches after the statute of 27: so as there were no marches in that sense at the time of the making of the statute of 34.

The second argument is from the comparing of the place of the statute, whereupon our doubt riseth, namely, that there shall be and remain a lord president and council in the dominion of Wales and the marches of the same, *etc.* with another place of the same statute, where the word *marches* is left out; for the rule is, *opposita juxta se posita magis elucescunt.* There is a clause in the statute, which gives power and authority to the King to make and alter laws for the weal of his subjects of his dominion of Wales; there the word *marches* is omitted, because it was not thought reasonable to invest the King with a power to alter the laws, which is the subjects birthright, in any part of the realm of *England;* and therefore by the omission of the word *marches* in that place, you may manifestly collect the signification of the word in the other, that is to be meant of the four counties of England.

The third argument which we will use is this: the council of the marches was not erected by the act of

parliament, but confirmed; for there was a president and council long before in E. IV. his time, by matter yet appearing; and it is evident upon the statute itself, that in the very clause which we now handle, it referreth twice to the usage, *as heretofore hath been used.*

This then I infer, that whatsoever was the King's intention in the first erection of this court, was likewise the intention of the parliament in the establishing thereof, because the parliament builded upon an old foundation.

The King's intention appeareth to have had three branches, whereof every of them doth manifestly comprehend the four shires.

The first was the better to bridle the subject of Wales, which at that time was not reclaimed: and therefore it was necessary for the president and council there to have jurisdiction and command over the English shires; because that by the aid of them, which were undoubted good subjects, they might the better govern and suppress those that were doubtful subjects.

And if it be said, that it is true, that the four shires were comprehended in the commission of *oyer* and *terminer*, for the suppression of riots and misdemeanors, but not for the jurisdiction of a court of equity; to that I answer, that their commission of *oyer* and *terminer* was but *gladius in vagina*, for it was not put in practice amongst them; for even in punishment of riots and misdemeanors, they proceed not by their commission of *oyer* and *terminer* by way of jury, but as a council by way of examination. And again it was necessary to strengthen that court for their better countenance with both jurisdictions, as well civil as criminal, for *gladius gladium juvat*.

The second branch of the King's intention was to make a better equality of commerce, and intercourse in contracts and dealings between the subjects of Wales and the subjects of England; and this of necessity must comprehend the four shires: for otherwise, if the subject of England had been wronged by the Welsh on the sides of Wales, he might take his remedy nearer hand. But if the subject of Wales, for whose

weal and benefit the statute was chiefly made, had been wronged by the English in any of the shires, he might have sought his remedy at Westminster.

The third branch of the King's intent was to make a convenient dignity and state of the mansion and residance of his eldest son, when he should be created Prince of Wales, which likewise must plainly include the four shires: for otherwise to have sent *primogenitum Regis* to a government, which without the mixture of the four shires, as things then were, had more pearl than honour or command; or to have granted him only a power of lieutenancy in those shires, where he was to keep his state, not adorned with some authority civil, had not been convenient.

So that here I conclude the second part of that I am to say touching the intention of the parliament precedent.

Now touching the construction subsequent, the rule is good, *optimus legum interpres consuetudo;* for our labour is not to maintain an usage against a statute, but by an usage to expound a statute; for no man will say, but the word *marches* will bear the sense that we give it.

This usage or custom is fortified by four notable circumstances; first, that it is ancient and not late or recent; secondly, it is authorised and not popular or vulgar; thirdly, that it hath been admitted and quiet, and not litigious or interrupted; and fourthly, when it was brought in question, which was but once, it hath been affirmed *judicio controverso.*

For the first, there is record of a president and council, that hath exercised and practised jurisdiction in these shires, as well sixty years before the statute, namely, since 18 E. IV. as the like number of years since: so that it is *Janus bifrons*, it hath a face backward from the statute, as well as forwards.

For the second, it hath received these allowances by the practice of that court, by suits originally commenced there, by remanding from the courts of Westminster, when causes within those shires have been commenced here above; sometimes in chancery, sometimes in the star-chamber, by the admittance

of divers great learned men and great judges, that have been of that council and exercised that jurisdiction; as at one time Bromley, Morgan, and Brook, being the two chief justices, and chief baron, and divers others; by the King's learned council, which always were called to the penning of the King's instructions; and lastly, by the King's instructions themselves, which though they be not always extant, yet it is manifest that since 17 H. VIII. when Princess Mary went down, that the four shires were ever comprehended in the instructions, either by name, or by that that amounts to so much. So as it appears that this usage or practice hath not been an obscure custom practised by the multitude, which is many times erroneous, but authorised by the judgment and consent of the state: for as it is *vera vox* to say, *maximus erroris populus magister;* so it is *dura vox* to say, *maximus erroris princeps magister.*

For the third, it was never brought in question till 16 Eliz. in the case of one Wynde.

And for the fourth, the controversy being moved in that case, it was referred to Gerrard attorney, and Bromley solicitor, who was afterwards chancellor of England, and had his whole state of living in Shropshire and Worcester, and by them reported to the lords of the council in the star-chamber, and upon their report decreed, and the jurisdiction affirmed.

Lastly, I will conclude with two manifest badges and tokens, though but external yet violent in demonstration, that these four shires were understood by the word *marches;* the one the denomination of that council, which was ever in common appellation termed and stiled *the council* of the *marches*, or in the *marches*, rather than the council of Wales, or in Wales, and *denominatio est a digniore.* If it had been intended of lordships marchers, it had been as if one should have called my lord mayor, my lord mayor of the suburbs. But it was plainly intended of the four English shires, which indeed were the more worthy.

And the other is of the perpetual resiance and mansion of the council, which was evermore in the shires;

and to imagine that a court should not have jurisdiction where it sitteth, is a thing utterly improbable, for they should be *tanquam piscis in arido.*

So as upon the whole matter, I conclude that the word *marches* in that place by the natural sense, and true intent of the statute, is meant the four shires.

The effect of that, that was spoken by serjeant Hutton and serjeant Harris, in answer of the former argument, and for the excluding of the jurisdiction of the marches in the four shires.

THAT, which they both did deliver, was reduced to three heads:

The first to prove the use of the word *marches* for lordships marchers.

The second to prove the continuance of that use of the word, after the statute of 27, that made the lordships marchers shire-grounds; whereupon it was inferred, that though the marches were destroyed in nature, yet they remained in name.

The third was some collections they made upon the statute of 34; whereby they inferred, that that statute intended that word in that signification.

For the first, they did alledge divers statutes before 27 Hen. VIII. and divers book-cases of law in print, and divers offices and records, wherein the word *marches* of Wales was understood of the lordships marchers.

They said farther, and concluded, that whereas we shew our sense of the word but rare, they shew theirs common and frequent: and whereas we shew it but in a vulgar use and acceptation, they shew theirs in a legal use in statutes, authorities of books, and ancient records.

They said farther, that the example we brought of marches upon Scotland, was not like, but rather contrary; for they were never called *marches* of Scotland, but the *marches* of England: whereas the statute of 34 doth not speak of the *marches* of England, but of the *marches* of Wales.

They said farther, that the county of Worcester did in no place or point touch upon Wales, and therefore that county could not be termed *marches*.

To the second they produced three proofs; first, some words in the statute of 32 H. VIII. where the statute, providing for a form of trial for treason committed in Wales, and the *marches* thereof, doth use that word, which was in time after the statute of 27; whereby they prove the use of the word continued.

The second proof was out of two places of the statute, whereupon we dispute, where the word *marches* is used for the lordships marchers.

The third proof was the stile and form of the commission of *oyer* and *terminer* even to this day, which run to give power and authority to the president and council there, *infra principalitat. Walliæ*, and *infra* the four counties by name, with this clause farther, *et marchias Walliæ eisdem comitatibus adjacent'*: whereby they infer two things strongly, the one that the *marches* of Wales must needs be a distinct thing from the four counties; the other that the word *marches* was used for the lordships marchers long after both statutes.

They said farther, that otherwise the proceeding, which had been in the four new erected counties of Wales by the commission of *oyer* and *terminer*, by force whereof many had been proceeded with both for life, and otherways, should be called in question, as *coram non judice*, insomuch as they neither were part of the principality of Wales, nor part of the four shires; and therefore must be contained by the word *marches*, or not at all.

For the third head, they did insist upon the statute of 34, and upon the preamble of the same statute.

The title being an act for certain ordinances in the King's Majesty's dominion and principality of Wales; and the preamble being for the tender zeal and affection that the King bears to his subjects of Wales; and again, at the humble suit and petition of his subjects of Wales: whereby they infer that the statute had no purpose to extend or intermeddle with any part of the King's dominions or subjects but only within Wales.

And for usage and practice, they said, it was nothing against an act of parliament.

And for the instructions, they pressed to see the instructions immediately after the statute made.

And for the certificate and opinions of Gerrard and Bromley, they said they doubted not, but that if it were now referred to the attorney and solicitor, they would certify as they did.

And lastly, they relied, as upon their principal strength, upon the precedent of that, which was done of the exempting of Cheshire from the late jurisdiction of the said council; for they said, that from 34 of H. VIII. until 11 of Queen Eliz. the court of the marches did usurp jurisdiction upon that county, being likewise adjacent to Wales, as the other four are; but that in the eleventh year of Queen Elizabeth aforesaid, the same being questioned at the suit of one Radforde, was referred to the lord Dyer, and three other judges, who, by their certificate at large remaining of record in the chancery, did pronounce the said shire to be exempted, and that in the conclusion of their certificate they gave this reason, because it was no part of the principality or marches of Wales. By which reason, they say, it should appear their opinion was, that the word *marches* could not extend to counties adjacent. This was the substance of their defence.

The reply of the King's Solicitor to the arguments of the two serjeants.

HAVING divided the substance of their arguments, *ut supra*, he did pursue the same division in his reply, observing nevertheless both a great redundancy and a great defect in that which was spoken. For touching the use of the word *marches*, great labour had been taken, which was not denied: but touching the intent of the parliament, and the reasons to demonstrate the same, which were the life of the question, little or nothing had been spoken.

And therefore as to the first head, that the word

marches had been often applied to the lordships marchers, he said it was the sophism which is called *sciomachia,* fighting with their shadows; and that the sound of so many statutes, so many printed book cases, so many records, were *nomina magna,* but they did not press the question; for we grant that the word *marches* had significations, sometimes for the counties, sometimes for the lordships marchers, like as Northampton and Warwick are sometimes taken for the towns of Northampton and Warwick, and sometimes for the counties of Northampton and Warwick. And Dale and Sale are sometimes taken for the villages or hamlets of Dale and Sale, and sometimes taken for the parishes of Dale and Sale: and therefore that the most part of that they had said, went not to the point.

To that answer, which was given to the example of the middle shires upon Scotland, it was said, it was not *ad idem;* for we used it to prove that the word *marches* may and doth refer to whole counties; and so much it doth manifestly prove; neither can they deny it. But then they pinch upon the addition, because the English counties adjacent upon Scotland are called the *marches* of England, and the English counties adjacent upon Wales are called the *marches* of Wales; which is but a difference in phrase: for sometimes limits and borders have their names of the inward country, and sometimes of the outward country; for the distinction of *exclusivè* and *inclusivè* is a distinction both in time and place; as we see that that which we call this day fortnight, excluding the day, the French and the law-phrase calls this day fifteen days, or *quindena,* including the day. And if they had been called the marches upon Wales or the marches against Wales, then it had been clear and plain; and what difference between the banks of the sea and the banks against the sea? So that he took this to be but a toy or cavillation, for that phrases of speech are *ad placitum, et recipiunt casum.*

As to the reason of the map, that the county of Worcester doth no way touch upon Wales, it is true; and I do find when the lordships marchers were

annexed, some were laid to every other of the three shires, but none to Worcester. And no doubt but this emboldened Wynde to make the claim to Worcester, which he durst not have thought on for any of the other three. But it falls out well that that, which is the weakest in probability, is strongest in proof; for there is a case ruled in that more than in the rest. But the true reason is, that usage must overrule propriety of speech; and therefore if all commissions, and instructions, and practices, have coupled these four shires, it is not the map that will sever them.

To the second head he gave this answer. First he observed in general that they had not shewed one statute, or one book-case, or one record, the commissions of *oyer* and *terminer* only excepted, wherein the word *marches* was used for lordships marchers since the statute of 34. So that it is evident, that as they granted the nature of those marches was destroyed and extinct by 27; so the name was discontinued soon after, and did but remain a very small while, like the sound of a bell, after it hath been rung; and as indeed it is usual when names are altered, that the old name, which is expired, will continue for a small time.

Secondly, he said, that whereas they had made the comparison, that our acceptation of the word was popular, and theirs was legal, because it was extant in book-cases, and statutes, and records, they must needs confess that they are beaten from that hold: for the name ceased to be legal clearly by the law of 27, which made the alteration in the thing itself, whereof the name is but a shadow; and if the name did remain afterwards, then it was neither legal, nor so much as vulgar, but it was only by abuse, and by a trope or *catachresis*.

Thirdly, he shewed the impossibility how that signification should continue, and be intended by the statute of 34. For if it did, it must be in one of these two senses, either that it was meant of the lordships marchers made part of Wales, or of the lordships marchers annexed to the four shires of England.

For the first of these, it is plainly impugned by the statute itself: for the first clause of the statute doth set forth that the principality and dominion of Wales shall consist of twelve shires: wherein the four new-erected counties, which were formerly lordships marchers, and whatsoever else was lordships marchers annexed to the ancient counties of Wales, is comprehended; so that of necessity all that territory or border must be Wales: then followeth the clause *immediately*, whereupon we now differ, namely, that there shall be and remain a president and council in the principality of Wales, and the marches of the same; so that the parliament could not forget so soon what they had said in the clause next before: and therefore by the marches they meant somewhat else besides that which was Wales. Then if they fly to the second signification, and say that it was meant by the lordships marchers annexed to the four English shires; that device is merely *nuper nata oratio*, a mere fiction and invention of wit, crossed by the whole stream and current of practice; for if that were so, the jurisdiction of the council should be over part of those shires, and in part not; and then in the suits commenced against any of the inhabitants of the four shires, it ought to have been laid or shewed that they dwelt within the ancient lordships marchers, whereof there is no shadow that can be shewed.

Then he proceeded to the three particulars. And for the statute of 32, for trial of treason, he said it was necessary that the word *marches* should be added to Wales, for which he gave this reason, that the statute did not only extend to the trial of treasons, which should be committed after the statute, but did also look back to treasons committed before: and therefore this statute being made but five years after the statute of 27, that extinguished the lordships marchers, and looking back, as was said, was fit to be penned with words that might include the preterperfect tense, as well as the present tense; for if it had rested only upon the word *Wales*, then a treason committed before the lordships marchers were made part of Wales, might have escaped the law.

To this also another answer was given, which was, that the word *marches* as used in that statute, could not be referred to the four shires, because of the words following, wherewith it is coupled, namely, in Wales, and the marches of the same, where the King's writ runs not.

To the two places of the statute of 34 itself, wherein the word *marches* is used for lordships marchers; if they be diligently marked, it is merely sophistry to alledge them; for both of them do speak by way of recital of the time past before the statute of 27, as the words themselves being read over will shew without any other inforcement; so that this is still to use the almanack of the old year with the new.

To the commissions of *oyer* and *terminer*, which seemeth to be the best evidence they shew for the continuance of the name in that tropical or abused sense, it might move somewhat, if this form of penning those commissions had been begun since the statute of 27. But we shew forth the commission in 17 H. VIII. when the Princess Mary went down, running in the same manner *verbatim*, and in that time it was proper, and could not otherwise be. So that it appeareth that it was but merely a *fac simile*, and that notwithstanding the case was altered, yet the clerk of the crown pursued the former precedent; hurt it did none, for the word *marches* is there superfluous.

And whereas it was said, that the words in those commissions were effectual, because else the proceeding in the four new-erected shires of Wales should be *coram non judice*, that objection carrieth no colour at all; for it is plain, they have authority by the word *principality of Wales*, without adding the word *marches*; and that is proved by a number of places in the statute of 34, where if the word *Wales* should not comprehend those shires, they should be excluded in effect of the whole benefit of that statute; for the word *marches* is never added in any of these places.

To the third head touching the true intent of the statute, he first noted how naked their proof was in that kind, which was the life of the question, for all the rest was but *in litera et in cortice*.

He observed also that all the strength of our proof, that concerned that point, they had passed over in silence, as belike not able to answer: for they had said nothing to the first intentions of the erections of the court, whereupon the parliament built; nothing to the diversity of penning, which was observed in the statute of 34, leaving out the word *marches*, and resting upon the word *Wales* alone; nothing to the resiance, nothing to the denomination, nothing to the continual practice before the statute and after, nothing to the King's instructions, *etc.*

As for that, that they gather out of the title and preamble, that the statute was made for Wales, and for the weal and government of Wales, and at the petition of the subjects of Wales, it was little to the purpose; for no man will affirm on our part the four English shires were brought under the jurisdiction of that council, either first by the King, or after by the parliament, for their own sakes, being in parts no farther remote; but it was for congruity's sake, and for the good of Wales, that that commixture was requisite: and *turpis est pars, quæ non congruit cum toto.* And therefore there was no reason, that the statute should be made at their petition, considering they were not *primi in intentione,* but came *ex consequenti.*

And whereas they say that usage is nothing against an act of parliament, it seems they do voluntarily mistake, when they cannot answer; for we do not bring usage to cross an act of parliament, where it is clear, but to expound an act of parliament, where it is doubtful, and evermore *contemporanea interpretatio,* whether it be of statute or Scripture, or author whatsoever, is of greatest credit: for to come now, above sixty years after, by subtilty of wit to expound a statute otherwise than the ages immediately succeeding did conceive it, is *expositio contentiosa,* and not *naturalis.* And whereas they extenuate the opinion of the attorney and solicitor, it is not so easy to do: for first they were famous men, and one of them had his patrimony in the shires; secondly, it was of such

weight, as a decree of the council was grounded upon it; and thirdly, it was not unlike, but that they had conferred with the judges, as the attorney and solicitor do often use in like cases.

Lastly, for the exemption of Cheshire he gave this answer. First, that the certificate in the whole body of it, till within three or four of the last lines, doth rely wholly upon that reason, because it was a county Palatine: and to speak truth, it stood not with any great sense or proportion, that that place which was privileged and exempted from the jurisdiction of the courts of Westminster, should be meant by the parliament to be subjected to the jurisdiction of that council.

Secondly, he said that those reasons, which we do much insist upon for the four shires, hold not for Cheshire, for we say it is fit the subject of Wales be not forced to sue at Westminster, but have his justice near hand; so may he have in Cheshire, because there is both a justice for common law and a chancery; we say it is convenient for the Prince, if it please the King to send him down, to have some jurisdiction civil as well as for the peace; so may he have in Cheshire, as earl of Chester. And therefore those grave men had great reason to conceive that the parliament did not intend to include Cheshire.

And whereas they pinch upon the last words in the certificate, namely, that Cheshire was no part of the dominion, nor of the marches, they must supply it with this sense, not within the meaning of the statute; for otherwise the judges could not have discerned of it; for they were not to try the fact, but to expound the statute; and that they did upon those reasons, which were special to Cheshire, and have no affinity with the four shires.

And therefore, if it be well weighed, that certificate makes against them; for as *exceptio firmat legem in casibus non exceptis*, so the excepting of that shire by itself doth fortify, that the rest of the shires were included in the very point of difference.

After this he shewed a statute in 18 Eliz. by which provision is made for the repair of a bridge called

Chepstow-bridge between Monmouth and Glocester, and the charge lay in part upon Glocestershire; in which statute there is a clause, that if the justices of peace do not their duty in levying of the money, they shall forfeit five pounds to be recovered by information before the council of the marches; whereby he inferred that the parliament would never have assigned the suit to that court, but that it conceived Glocestershire to be within the jurisdiction thereof. And therefore he concluded that here is in the nature of a judgment by parliament, that the shires are within the jurisdiction.

The third and last argument of the King's Solicitor in the case of the marches in reply to serjeant Harris.

THIS case groweth now to some ripeness, and I am glad we have put the other side into the right way; for in former arguments they laboured little upon the intent of the statute of 34 H. VIII. and busied themselves in effect altogether about the force and use of the word *marches:* but now finding that *litera mortua non prodest,* they offer at the true state of the question, which is the intent: I am determined therefore to reply to them in their own order, *ut manifestum sit,* as he saith, *me nihil aut subterfugere voluisse reticendo, aut obscurare dicendo.*

All which hath been spoken on their part consisteth upon three proofs.

The first was by certain inferences to prove the intent of the statute.

The second was to prove the use of the word *marches* in their sense long after both statutes; both that of 27, which extinguished the lordships marchers, and that of 34, whereupon our question ariseth.

The third was to prove an interruption of that practice and use of jurisdiction, upon which we mainly insist, as the best exposition of the statute.

For the first of these, concerning the intention, they brought five reasons.

The first was that this statute of 34, was grounded upon a platform, or preparative of certain ordinances made by the King two years before, namely, 32;

in which ordinances there is the very clause, whereupon we dispute, namely, That there should be and remain in the dominion and principality of Wales a president and a council: in which clause nevertheless the word *marches* is left out, whereby they collect that it came into the statute of 34, but as a slip, without any farther reach or meaning.

The second was, that the mischief before the statute, which the statute means to remedy, was, that Wales was not governed according to similitude or conformity with the laws of England. And therefore, that it was a cross and perverse construction, when the statute laboured to draw Wales to the laws of England, to construe it, that it should abridge the ancient subjects of England of their own laws.

The third was, that in a case of so great importance it is not like that if the statute had meant to include the four shires, it would have carried it in a dark general word, as it were *noctanter*, but would have named the shires to be comprehended.

The fourth was, the more to fortify the third reason, they observed that the four shires are remembered and named in several places of the statute, three in number; and therefore it is not like that they would have been forgotten in the principal place, if they had been meant.

The fifth and last was, that there is no clause of attendance, that the sheriffs of the four shires should attend the lord president and the council; wherein there was urged the example of the acts of parliament, which erected courts; as the court of augmentations, the court of wards, the court of survey; in all which there are clauses of attendance; whereupon they inferred that evermore, where a statute gives a court jurisdiction, it strengtheneth it with a clause of attendance; and therefore no such clause being in this statute, it is like there was no jurisdiction meant. Nay, farther they noted, that in this very statute for the justices of Wales, there is a clause of attendance from the sheriffs of Wales.

In answer to their first reason, they do very well, in my opinion, to consider Mr. Attorney's business and mine, and therefore to find out for us evidence

and proofs, which we have no time to search; for certainly nothing can make more for us than these ordinances, which they produce; for the diversity of penning of that clause in the ordinances, where the word *marches* is omitted, and that clause in the statute where the word *marches* is added, is a clear and perfect direction what was meant by that word. The ordinances were made by force and in pursuance of authority given to the King by the statute of 27; to what did the statute extend? Only to Wales. And therefore the word *marches* in the ordinances is left out; but the statute of 34 respected not only Wales, but the commixed government, and therefore the word *marches* was put in. They might have remembered that we built an argument upon the difference of penning of that statute of 34 itself in the several clauses of the same; for that in all other clauses, which concern only Wales, the word *marches* is ever omitted; and in that clause alone that concerneth the jurisdiction of the president and council, it is inserted. And this our argument is notably fortified by that they now shew of the ordinances, where in the very self-same clause touching the president and council, because the King had no authority to meddle but with Wales, the word *marches* is omitted. So that it is most plain that this word comes not in by chance or slip, but with judgment and purpose, as an effectual word; for, as it was formerly said, *opposita juxta se posita magis elucescunt;* and therefore I may likewise urge another place in the statute which is left out in the ordinance; for I find there is a clause that the town of Bewdley, which is confessed to be no lordships marcher, but to lie within the county of Worcester; yet because it was an exempted jurisdiction, is by the statute annexed unto the body of the said county. First, this shews that the statute of 34 is not confined to Wales, and the lordships marchers, but that it intermeddles with Worcestershire. Next, do you find any such clause in the ordinance of 32? No. Why? Because they were appropriated to Wales So that in

my opinion nothing could inforce our exposition better than the collating of the ordinance of 32 with the statute of 34.

In answer to the second reason, the course, that I see often taken in this cause, makes me think of the phrase of the Psalm, *starting aside like a broken bow:* so when they find their reasons broken, they start aside to things not in question. For now they speak, as if we went about to make the four shires Wales, or to take from them the benefit of the laws of England, or their being accounted amongst the ancient counties of England: doth any man say that those shires are not within the circuits of England, but subject to the justices of Wales? or that they should send but one knight to the parliament, as the shires of Wales do? or that they may not sue at Westminster, in chancery, or at common law, or the like? No man affirms any such things; we take nothing from them, only we give them a court of summary justice in certain causes at their own doors.

And this is *nova doctrina* to make such an opposition between law and equity, and between formal justice and summary justice. For there is no law under heaven which is not supplied with equity; for *summum jus, summa injuria*, or, as some have it, *summa lex, summa crux.* And therefore all nations have equity; but some have law and equity mixed in the same court, which is the worse; and some have it distinguished in several courts, which is the better. Look into any counties Palatine, which are small models of the great government of kingdoms, and you shall never find any but had a chancery.

Lastly, it is strange that all other places do require courts of summary justice, and esteem them to be privileges and graces; and in this cause only they are thought to be servitudes and loss of birth-right. The universities have a court of summary justice, and yet I never heard that scholars complain their birth-right was taken from them. The stannaries have them, and you have lately affirmed the jurisdiction: and yet you have taken away no man's birth-right. The court at

York, whosoever looks into it, was erected at the petition of the people, and yet the people did not mean to cast away their birth-right. The court of wards is mixed with discretion and equity; and yet I never heard that infants and innocents were deprived of their birth-right. London, which is the seat of the kingdom, hath a court of equity, and holdeth it for a grace and favour; how then cometh this case to be singular? And therefore these be new phrases and conceits proceeding of error or worse; and it makes me think that a few do make their own desires the desires of the country, and that this court is desired by the greater number, though not by the greater stomachs.

In answer to the third reason, if men be conversant in the statutes of this kingdom, it will appear to be no new thing to carry great matters in general words without other particular expressing. Consider but of the statute of 26 H. VIII. which hath carried estates tails under the general words of estates of inheritance. Consider of the statute of 16 R. II. of *præmunire*, and see what great matters are thought to be carried under the word *alibi*. And therefore it is an ignorant assertion to say that the statute would have named the shires, if it had meant them.

Secondly, the statute had more reason to pass it over in general words, because it did not ordain a new matter, but referreth to usage: and though the statute speaks generally, yet usage speaks plainly and particularly, which is the strongest kind of utterance or expressing. *Quid verba audiam, cum facta videam.*

And thirdly, this argument of theirs may be strongly retorted against them, for as they infer that the shires were not meant, because they were not included by name; so we infer that they are meant, because they are not excepted by name, as is usual by way of proviso in like cases: and our inference hath far greater reason than theirs, because at the time of the making of the statute they were known to be under the jurisdiction: and therefore that ought to be most plainly expressed, which should work a change, and not that which should continue things as they were.

In answer to their fourth reason, it makes likewise plainly against them; for there be three places where the shires be named, the one for the extinguishing of the custom of Gavelkind; the second for the abolishing of certain forms of assurance which were too light to carry inheritance and freehold; the third for the restraining of certain franchises to that state they were in by a former statute. In these three places the words of the statute are, The lordships marchers annexed unto the counties of Hereford, Salop, *etc.*

Now mark, if the statute conceived the word *marches* to signify lordships marchers, what needeth this long circumlocution? It had been easier to have said, within the *marches*. But because it was conceived that the word *marches* would have comprehended the whole counties, and the statute meant but of the lordships marchers annexed; therefore they were inforced to use that *periphrasis* or length of speech.

In answer to the fifth reason, I give two several answers; the one, that the clause of attendance is supplied by the word *incidents;* for the clause of establishment of the court hath that word, *with all incidents to the same as heretofore hath been used:* for execution is ever incident to justice or jurisdiction. The other because it is a court, that standeth not by the act of parliament alone, but by the King's instructions, whereto the act refers. Now no man will doubt but the King may supply the clause of attendance; for if the King grant forth a commission of *oyer* and *terminer*, he may command what sheriff he will to attend it; and therefore there is a plain diversity between this case and the cases they vouch of the court of wards, survey, and augmentations: for they were courts erected *de novo* by parliament, and had no manner of reference either to usage or instructions; and therefore it was necessary that the whole frame of those courts, and their authority both for judicature and execution, should be described and expressed by parliament. So was it of the authority of the justices of Wales in the statute of 34 mentioned, because there are many ordinances *de novo* concerning them;

so that it was a new erection, and not a confirmation of them.

Thus have I, in confutation of their reasons, greatly, as I conceive, confirmed our own, as it were with new matter; for most of that they have said made for us. But as I am willing to clear your judgments, in taking away the objections; so I must farther pray in aid of your memory for those things which we have said, whereunto they have offered no manner of answer; for unto all our proofs which we made touching the intent of the statute, which they grant to be the spirit and life of this question, they said nothing: as not a word to this; That otherwise the word *marches* in the statute should be idle or superfluous: not a word to this; That the statute doth always omit the word *marches* in things that concern only Wales: not a word to this; That the statute did not mean to innovate but to ratify, and therefore if the shires were in before, they are in still: not a word to the reason of the commixed government, as that it was necessary for the reclaiming of Wales to have them conjoined with the shires; that it was necessary for commerce and contracts, and properly for the ease of the subjects of Wales against the inhabitants of the shires; that it was not probable that the parliament meant the Prince should have no jurisdiction civil in that place, where he kept his house. To all these things, which we esteem the weightiest, there is *altum silentium*, after the manner of children that skip over where they cannot spell.

Now to pass from the intent to the word; first, I will examine the proofs they have brought that the word was used in their sense after the statute 27 and 34; then I will consider what is gained, if they should prove so much; and lastly, I will briefly state our own proofs, touching the use of the word.

For the first, it hath been said, that whereas I called the use of the word *marches* after the statute of 27, but a little chime at most of an old word, which soon after vanished, they will now ring us a peal of statutes to prove it; but if it be a peal, I am sure it is a peal of bells, and not a peal of shot: for it clatters, but

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it doth not strike: for of all the catalogue of statutes I find scarcely one, save those that were answered in my former argument; but we may with as good reason affirm in every of them the word *marches* to be meant of the counties marches, as they can of the lordships marchers: for to begin upwards:

The statute 39 Eliz. for the repair of Wilton-bridge, no doubt doth mean the word *marches* for the counties; for the bridge itself is in Herefordshire, and the statute imposeth the charge of reparation upon Herefordshire by compulsory means, and permitteth benevolence to be taken in Wales, and the marches; who doubts, but this meant of the other three shires, which have far greater use of the bridge than the remote counties of Wales?

For the statute 5 Eliz. concerning perjury, it hath a proviso, that it shall not be prejudicial to the council of the marches for punishing of perjury; who can doubt but that here *marches* is meant of the shires, considering the perjuries committed in them have been punished in that court as well as in Wales?

For 2 Ed. VI. and the clause therein for restraining tithes of marriage-portions in Wales and the marches, why should it not be meant of counties? For if any such customs had crept and incroached into the body of the shires out of the lordships marchers, no doubt the statute meant to restrain them as well there as in the other places.

And so for the statute of 32 H. VIII. which ordains that the benefit of that statute for distress to be had by executors, should not extend to any lordship in Wales, or the marches of the same where *mises* are paid, because that imports a general release; what absurdity is there, if there the marches be meant for the whole shires? for if any such custom had spread so far, the reason of the statute is alike.

As for the statutes of 37 H. VIII. and 4 Ed. IV. for the making and appointing of the *custos rotulorum*, there the word *marches* must needs be taken for limits, according to the etymology and derivation: for the words refer not to Wales, but are thus, *within England and Wales, and other the King's dominions, marches*

and territories, that is, *limits and territories;* so as I see no reason, but I may truly maintain my former assertion, that after the lordships marchers were extinct by the statute of 27, the name also of marches was discontinued, and rarely if ever used in that sense.

But if it should be granted that it was now and then used in that sense, it helps them little; for first it is clear that the legal use of it is gone, when the thing was extinct, for *nomen est rei nomen;* so it remains but *abusivè*, as if one should call *Guletta, Carthage*, because it was once *Carthage;* and next, if the word should have both senses, and that we admit an equivocation, yet we so overweigh them upon the intent, as the balance is soon cast.

Yet one thing I will note more, and that is, that there is a certain confusion of tongues on the other side, and that they cannot well tell themselves what they would have to be meant by the word *marches;* for one while they say it is meant for the lordships marchers *generally*, another while they say that it is meant for the inward marches on *Wales side only;* and now at last they are driven to a poor shift, that there should be left some *little lordship marcher* in the dark, as *casus omissus*, not annexed at all to any county; but if they would have the statute satisfied upon that only, I say no more to them, but *aquila non capit muscas.*

Now I will briefly remember unto you the state of our proofs of the word.

First, according to the laws of speech we prove it by the etymology or derivation, because *march* is the Saxon word for limit, and *marchio* is *comes limitaneus;* this is the opinion of Camden and others.

Next we prove the use of the word in the like case to be for counties, by the example of the marches of Scotland: for as it is prettily said in Walker's case by Gawdy, if a case have no cousin, it is a sign it is a bastard, and not legitimate; therefore we have shewed you a cousin, or rather a brother, here within our own island of the like use of the word. And whereas a great matter was made that the now middle shires were never called the marches of Scotland, but the marches of England against Scotland, or upon Scot-

land; it was first answered that that made no difference; because sometimes the *marches* take their name of the inward country, and sometimes of the out-country; so that it is but *inclusivè* and *exclusivè:* as for example, that which we call in vulgar speech this day *fortnight*, excluding the day, that the law calls *quindena*, including the day; and so likewise, who will make a difference between the banks of the sea, and the banks against the sea, or upon the sea? But now to remove all scruple, we shew them Littleton in his chapter *Of grand serjeanty*, where he saith, there is a tenure by cornage in the *marches* of Scotland: and we shew them likewise the statute of 25 Edw. III. *Of labourers*, where they are also called the *marches of Scotland.*

Then we shew some number of bills exhibited to the council there before the statute, where the plaintiffs have the addition of place confessed within the bodies of the shires, and no lordships marchers, and yet are laid to be in the *marches.*

Then we shew divers accounts of auditors in the Duchy from H. IV. downwards, where the indorsement is *in marchiis Walliæ*, and the contents are possessions only of Hereford and Glocestershire, (for in Shropshire and Worcestershire the Duchy hath no lands;) and whereas they would put it off with a *cuique in sua arte credendum*, they would believe them, if it were in matter of accounts; we do not alledge them as auditors, but as those that speak English to prove the common use of the word, *loquendum ut vulgus.*

We shew likewise an ancient record of a patent to Herbert in 15 E. IV. where Kilpeck is laid to be in *com. Hereford in marchiis Walliæ;* and lastly, we shew again the statute of 27 E. III. where provision is made, that men shall labour in the summer where they dwell in the winter; and there is an exception of the people of the counties of Stafford and Lancashire, *etc.* and of the marches of Wales and Scotland; where it is most plain, that the marches of Wales are meant for counties, because they are coupled both with Stafford and Lancashire, which are counties, and with the

marches of Scotland, which are likewise counties; and as it is informed, the labourers of those four shires do come forth of their shires, and are known by the name of Cokers to this day.

To this we add two things, which are worthy consideration; the one, that there is no reason to put us to the proof of the use of this word *marches* sixty years ago, considering that usage speaks for us; the other, that there ought not to be required of us to shew so frequent an use of the word *marches* of ancient time in our sense, as they shewed in theirs, because there was not the like occasion: for when a lordship marcher was mentioned it was of necessity to lay it in the *marches*, because they were out of all counties; but when land is mentioned in any of these counties, it is superfluous to add, in the marches; so as there was no occasion to use the word *marches*, but either for a more brief and compendious speech to avoid the naming of the four shires, as it is in the statute of 25 E. III. and in the indorsement of accounts; or to give a court cognisance and jurisdiction, as in the bills of complaint; or *ex abundanti*, as in the record of Kilpeck.

There resteth the third main part, whereby they endeavour to weaken and extenuate the proofs which we offer touching practice and possession, wherein they alledge five things.

First, that Bristol was in until 7 Eliz. and then exempted.

Secondly, that Cheshire was in until 11 Eliz. and then went out.

Thirdly, they alledge certain words in the instructions to Cholmley vice-president in 11 Eliz. at which time the shires were first comprehended in the instructions by name, and in these words, *annexed by our commission:* whereupon they would infer that they were not brought in the statute, but only came in by instructions, and do imagine that when Cheshire went out they came in.

Fourthly, they say, that the intermeddling with those four shires before the statute was but an usur-

pation and toleration, rather than any lawful and settled jurisdiction; and it was compared to that, which is done by the judges in their circuits, who end many causes upon petitions.

Fifthly, they alledge Sir John Mullen's case, where it is said, *consuetudo non præjudicat veritati.*

There was moved also, though it were not by the council, but from the judges themselves, as an extenuation, or at least an obscuring of the proofs of the usage and practice, in that we shew forth no instructions from 17 H. VIII. to 1 Mariæ.

To these six points I will give answer, and, as I conceive, with satisfaction.

For Bristol, I say it teacheth them the right way, if they can follow it; for Bristol was not exempt by any opinion of law, but was left out of the instructions upon supplication made to the Queen.

For Cheshire, we have answered it before, that the reason was, because it was not probable that the statute meant to make that shire subject to the jurisdiction of that council, considering it was not subject to the high courts at Westminster, in regard it was a county Palatine. And whereas they said, that so was Flintshire too, it matcheth not, because Flintshire is named in the statute for one of the twelve shires of Wales.

We shewed you likewise effectual differences between Cheshire and these other shires: for that Cheshire hath a chancery in itself, and over Cheshire the Princes claim jurisdiction, as earl of Chester; to all which you reply nothing.

Therefore I will add this only, that Cheshire went out *secundo flumine*, with the good-will of the state; and this is sought to be evicted *adverso flumine*, cross the state; and as they have opinion of four judges for the excluding of Cheshire, so we have the opinions of two great learned men, Gerrard and Bromley, for the including of Worcester; whose opinions, considering it was but matter of opinion, and came not judicially in question, are not inferior to any two of the other; but we say that there is no oppo-

sition or repugnancy between them, but both may stand.

For Cholmley's instructions, the words may well stand, *that those shires are annexed by commission;* for the King's commission or instructions, for those words are commonly confounded, must co-operate with the statute, or else they cannot be annexed. But for that conceit that they should come in but in 11, when Cheshire went out, no man that is in his wits can be of that opinion, if he mark it: for we see that the town of Glocester, *etc.* is named in the instructions of 1 Mar. and no man, I am sure, will think that Glocester town should be in, and Glocestershire out.

For the conceit, that they had it but *jurisdictionem precariam,* the precedents shew plainly the contrary; for they had coercion, and they did fine and imprison, which the judges do not upon petitions; and besides, they must remember that many of our precedents, which we did shew forth, were not of suits originally commenced there, but of suits remanded from hence out of the King's courts as to their proper jurisdiction.

For Sir John Mullen's case, the rule is plain and sound, that where the law appears contrary, usage cannot control law; which doth not at all infringe the rule of *optima legum interpres consuetudo;* for usage may expound law, though it cannot over-rule law.

But of the other side I could shew you many cases, where statutes have been expounded directly against their express letter to uphold precedents and usage, as 2 and 3 Phil. et Mar. upon the statute of Westminster, that ordained that the judges *coram quibus formatum erit appellum* shall enquire of the damages, and yet the law ruled that it shall be inquired before the judges of *Nisi prius.* And the great reverence given to precedents appeareth in 39 H. VI. 3 E. IV. and a number of other books; and the difference is exceedingly well taken in Slade's case, Coke's Reports 4. that is, where the usage runs but amongst clerks, and where it is in the eye and notice of the judge; for

there it shall be presumed, saith the book, that if the law were otherwise than the usage hath gone, that either the council or the parties would have excepted to it, or the judges *ex officio* would have discerned of it, and found it; and we have ready for you a calendar of judges more than sit at this table, that have exercised jurisdiction over the shires in that county.

As for exception, touching the want of certain instructions, I could wish we had them; but the want of them, in my understanding, obscureth the case little. For let me observe unto you, that we have three forms of instructions concerning these shires extant; the first names them not expressly, but by reference it doth, namely, that they shall hear and determine, *etc.* within any the *places* or *counties* within any of their commissions; and we have one of the commissions, wherein they were named; so as upon the matter they are named. And of this form are the ancient instructions before the statute 17 H. VIII. when the Princess Mary went down.

The second form of instructions go farther, for they have the towns, and exempted places within the counties named, with *tanquam* as well within the city of Glocester, the liberties of the Duchy of Lancaster, *etc.* as within any of the counties of any of their commissions; which clearly admits the counties to be in before. And of this form are the instructions 1 Mariæ, and so long until 11 Eliz.

And the third form, which hath been continued ever since, hath the shires comprehended by name. Now it is not to be thought, but the instructions which are wanting, are according to one of these three forms which are extant. Take even your choice, for any of them will serve to prove that the practice there was ever authorised by the instructions here. And so upon the whole matter, I pray report to be made to his Majesty, that the president and the council hath jurisdiction, according to his instructions, over the four shires, by the true construction of the statute of 34 H. VIII.

A

DRAUGHT OF AN ACT

Against an usurious shift of gain, in delivering commodities instead of money.

WHEREAS it is an usual practice, to the undoing and overthrowing many young gentlemen and others, that when men are in necessity, and desire to borrow money, they are answered, that money cannot be had, but that they may have commodities sold unto them upon credit, whereof they may make money as they can: in which course it ever comes to pass, not only that such commodities are bought at extreme high rates, and sold again far under foot to a double loss; but also that the party which is to borrow is wrapt in bonds and counter-bonds; so that upon a little money which he receiveth, he is subject to penalties and suits of great value.

Be it therefore enacted, by the authority of this present parliament, that if any man, after forty days from the end of this present session of parliament to be accounted, shall sell in gross sale any quantity of wares or commodities unto such a one as is no retailer, chapman, or known broker of the same commodities, and knowing that it is bought to be sold again, to help and furnish any person, that tradeth not in the same commodity, with money, he shall be without all remedy by law, or custom, or decree, or otherwise, to recover or demand any satisfaction for the said wares or commodities, what assurance soever he shall have by bond, surety, pawn or promise of the party, or any other in his behalf. And that all bonds and assurances whatsoever, made for that purpose directly or indirectly, shall be utterly void.

And be it further enacted, by the authority aforesaid, that every person, which shall after the time aforesaid be used or employed as a broker, mean or procurer, for the taking up of such commodities, shall forfeit for every such offence the sum of one hundred pounds, the same to be and shall be farther punished by six months imprisonment, without bail or mainprise, and by the pillory.

A

PREPARATION

TOWARD THE

UNION OF THE LAWS

OF

ENGLAND AND SCOTLAND.

YOUR Majesty's desire of proceeding towards the union of this whole island of Great Britain under one law, is, as far as I am capable to make any opinion of so great a cause, very agreeable to policy and justice. To policy, because it is one of the best assurances, as human events can be assured, that there will be never any relapse in any future ages to a separation. To justice, because *dulcis tractus pari jugo:* it is reasonable that communication of privilege draw on communication of discipline and rule. This work being of greatness and difficulty, needeth not to embrace any greater compass of designment, than is necessary to your Majesty's main end and intention. I consider therefore, that it is a true and received division of law into *jus publicum* and *privatum*, the one being the sinews of property, and the other of government; for that which concerneth private interest of *meum* and *tuum*, in my simple opinion, it is not at this time to be meddled with; men love to hold their own as they have held, and the difference of this law carrieth no mark of separation; for we see in any one kingdom, which is most at unity in itself, there is diversity of customs for the guiding of property and private rights: *in veste varietas sit, scissura non sit.* All the labour is to be spent in the other part; though perhaps not in all the other part; for, it may be, your Majesty, in your high wisdom, will discern that even in that part there will not be requisite a conformity in all points. And although such conformity were to be wished, yet

perchance it will be scarcely possible in many points to pass them for the present by assent of parliament. But because we that serve your Majesty in the service of our skill and profession, cannot judge what your Majesty, upon reason of state, will leave and take; therefore it is fit for us to give, as near as we can, a general information: wherein I, for my part, think good to hold myself to one of the parallels, I mean that of the English laws. For although I have read, and read with delight, the Scotish statutes, and some other collection of their laws; with delight I say, partly to see their brevity and propriety of speech, and partly to see them come so near to our laws; yet I am unwilling to put my sickle in another's harvest, but to leave it to the lawyers of the Scotish nation; the rather, because I imagine with myself that if a Scotish lawyer should undertake, by reading of the English statutes, or other our books of law, to set down positively in articles what the law of England were, he might oftentimes err: and the like errors, I make account, I might incur in theirs. And therefore, as I take it, the right way is, that the lawyers of either nation do set down in brief articles what the law is of their nation, and then after, a book of two columns, either having the two laws placed respectively, to be offered to your Majesty, that your Majesty may by a ready view see the diversities, and so judge of the reduction, or leave it as it is.

Jus publicum I will divide, as I hold it fittest for the present purpose, into four parts. The first, concerning criminal causes, which with us are truly accounted *publici juris*, because both the prejudice and the prosecution principally pertain to the crown and public estate. The second, concerning the causes of the Church. The third, concerning magistrates, offices, and courts: wherein falleth the consideration of your Majesty's regal prerogative, whereof the rest are but streams. And the fourth, concerning certain special politic laws, usages, and constitutions, that do import the public peace, strength, and wealth of the kingdom. In which part I do comprehend not only con-

stant ordinances of law, but likewise forms of administration of law, such as are the commissions of the peace, the visitations of the provinces by the judges of the circuits, and the like. For these in my opinion, for the purpose now in hand, deserve a special observation, because they being matters of that temporary nature, as they may be altered, as I suppose, in either kingdom, without parliament, as to your Majesty's wisdom may seem best; it may be the most profitable and ready part of this labour will consist in the introducing of some uniformity in them.

To begin therefore with capital crimes, and first that of treason.

CASES OF TREASON.

WHERE a man doth compass or imagine the death of the King, if it appear by any overt act, it is treason.

Where a man doth compass or imagine the death of the King's wife, if it appear by any overt act, it is treason.

Where a man doth compass or imagine the death of the King's eldest son and heir, if it appear by any overt act, it is treason.

Where a man doth violate the King's wife, it is treason.

Where a man doth violate the King's eldest daughter unmarried, it is treason.

Where a man doth violate the wife of the King's eldest son and heir, it is treason.

Where a man doth levy war against the King and his realm, it is treason.

Where a man is adherent to the King's enemies, giving them aid and comfort, it is treason.

Where a man counterfeiteth the King's great seal, it is treason.

Where a man counterfeiteth the King's privy seal, it is treason.

Where a man counterfeiteth the King's privy signet, it is treason.

Where a man doth counterfeit the King's sign manual, it is treason.

Where a man counterfeits the King's money, it is treason.

Where a man bringeth into the realm false money, counterfeited to the likeness of the coin of England, with intent to merchandise or make payment therewith, and knowing it to be false, it is treason.

Where a man counterfeiteth any foreign coin current in payment within this realm, it is treason.

Where a man doth bring in foreign money, being current within the realm, the same being false and counterfeit, with intent to utter it, and knowing the same to be false, it is treason.

Where a man doth clip, wash, round, or file any of the King's money, or any foreign coin current by proclamation, for gain's sake, it is treason.

Where a man doth any ways impair, diminish, falsify, scale, or lighten the King's money, or any foreign moneys current by proclamation, it is treason.

Where a man killeth the Chancellor, being in his place and doing his office, it is treason.

Where a man killeth the Treasurer, being in his place and doing his office, it is treason.

Where a man killeth the King's Justice in eyre, being in his place and doing his office, it is treason.

Where a man killeth the King's Justice of assise, being in his place and doing his office, it is treason.

Where a man killeth the King's Justice of *Oyer* and *Terminer*, being in his place and doing his office, it is treason.

Where a man doth persuade or withdraw any of the King's subjects from his obedience, or from the religion by his Majesty established, with intent to withdraw him from the King's obedience, it is treason.

Where a man is absolved, reconciled, or withdrawn from his obedience to the King, or promiseth his obedience to any foreign power, it is treason.

Where any Jesuit, or other priest ordained since the first year of the reign of Queen Elizabeth, shall come into, or remain in any part of this realm, it is *treason*.

Where any person being brought up in a college of Jesuits, or seminary, shall not return within six months after proclamation made, and within two days after his return submit himself to take the oath of supremacy, if otherwise he do return, or be within the realm, it is treason.

Where a man doth affirm or maintain any authority of jurisdiction spiritual, or doth put in use or execute any thing for the advancement or setting forth thereof, such offence, the third time committed, is treason.

Where a man refuseth to take the oath of supremacy, being tendred by the bishop of the diocese, if he be an ecclesiastical person; or by commission out of the chancery, if he be a temporal person; such offence, the second time, is treason.

Where a man committed for treason doth voluntarily break prison, it is treason.

Where a jailor doth voluntarily permit a man committed for treason to escape, it is treason.

Where a man procureth or consenteth to a treason, it is treason.

Where a man relieveth or comforteth a traitor, knowing it, it is treason.

The punishment, trial, and proceedings in cases of treason.

In treason, the corporal punishment is by drawing on a hurdle from the place of the prison to the place of execution, and by hanging and being cut down alive, bowelling, and quartering: and in women by burning.

In treason, there ensueth a corruption of blood in the line ascending and descending.

In treason, lands and goods are forfeited, and inheritances, as well intailed as fee simple, and the profits of estates for life.

In treason, the escheats go to the King, and not to the lord of the fee.

In treason, the lands forfeited shall be in the King's actual possession without office.

In treason there be no accessaries, but all are principals.

In treason, no benefit of clergy, or sanctuary, or peremptory challenge.

In treason, if the party stand mute, yet nevertheless judgment and attainder shall proceed all one as upon verdict.

In treason, bail is not permitted.

In treason, no counsel is to be allowed to the party.

In treason, no witness shall be received upon oath for the party's justification.

In treason, if the fact be committed beyond the seas, yet it may be tried in any county where the King will award his commission.

In treason, if the party be *non sanæ memoriæ*, yet if he had formerly confessed it before the King's council, and that it be certified that he was of good memory at the time of his examination and confession, the court may proceed to judgment without calling or arraigning the party.

In treason, the death of the party before conviction dischargeth all proceedings and forfeitures.

In treason, if the party be once acquitted, he shall not be brought in question again for the same fact.

In treason, no new case not expressed in the statute of 25 Ed. III. nor made treason by any special statute since, ought to be judged treason, without consulting with the parliament.

In treason, there can be no prosecution but at the King's suit, and the King's pardon dischargeth.

In treason, the King cannot grant over to any subject power and authority to pardon it.

In treason, a trial of a peer of the kingdom is to be by special commission before the Lord High Steward, and those that pass upon him to be none but peers; and the proceeding is with great solemnity, the Lord Steward sitting under a cloth of estate with a white rod of justice in his hand: and the peers may confer together, but are not any ways shut up: and are demanded by the Lord Steward their voices one by one, and the plurality of voices carrieth it. In treason, it

hath been an ancient use and favour from the Kings of this realm to pardon the execution of hanging, drawing, and quartering; and to make warrant for their beheading.

The proceeding in case of treason with a common subject is in the King's bench, or by commission of *Oyer* and *Terminer*.

MISPRISION OF TREASON.

Cases of misprision of treason.

WHERE a man concealeth high treason only, without any comforting or abetting, it is misprision of treason.

Where a man counterfeiteth any foreign coin of gold or silver not current in the realm, it is misprision of treason.

The punishment, trial, and proceeding in cases of misprision of treason.

The punishment of misprision of treason is by perpetual imprisonment, loss of the issues of their lands during life, and loss of goods and chattels.

The proceeding and trial is, as in cases of treason.

In misprision of treason bail is not admitted.

PETIT TREASON.

Cases of petit treason.

WHERE the servant killeth the master, it is petit treason.

Where the wife killeth her husband, it is petit treason.

Where a spiritual man killeth his prelate, to whom he is subordinate, and oweth faith and obedience, it is petit treason.

Where the son killeth the father or mother, it hath been questioned whether it be petit treason, and the late experience and opinion seemeth to weigh to the contrary, though against law and reason in my judgment.

The punishment, trial, and proceeding in cases of petit treason.

In petit treason, the corporal punishment is by drawing on an hurdle, and hanging, and in a woman burning.

In petit treason, the forfeiture is the same with the case of felony.

In petit treason, all accessaries are but in case of felony.

FELONY.

Cases of felony.

WHERE a man committeth murder, that is, homicide of prepensed malice, it is felony.

Where a man committeth manslaughter, that is, homicide of sudden heat, and not of malice prepensed, it is felony.

Where a man committeth burglary, that is, breaking of an house with an intent to commit felony, it is felony.

Where a man rideth armed, with a felonious intent, it is felony.

Where a man doth maliciously and feloniously burn a house, it is felony.

Where a man doth maliciously and feloniously burn corn upon the ground, or in stacks, it is felony.

Where a man doth maliciously cut out another's tongue, or put out his eyes, it is felony.

Where a man robbeth or stealeth, that is, taketh away another man's goods, above the value of twelvepence, out of his possession, with an intent to conceal it, it is felony.

Where a man imbezzleth or withdraweth any of the King's records at Westminster, whereby any judgment is reversed, it is felony.

Where a man that hath custody of the King's armour, munition, or other habiliments of war, doth maliciously convey away the same, to the value of twenty shillings, it is felony.

Where a servant hath goods of his master's delivered unto him, and goeth away with them, it is felony.

Where a man conjures, or invocates wicked spirits, it is felony.

Where a man doth use or practise any manner of witchcraft, whereby any person shall be killed, wasted, or lamed in his body, it is felony.

Where a man practiseth any witchcraft, to discover treasure hid, or to discover stolen goods, or to provoke unlawful love, or to impair or hurt any man's cattle or goods, the second time having been once before convicted of like offence, it is felony.

Where a man useth the craft of multiplication of gold or silver, it is felony.

Where a man committeth rape, it is felony.

Where a man taketh away a woman against her will, not claiming her as his ward or bondwoman, it is felony.

Where any person marrieth again, her or his former husband or wife being alive, it is felony.

Where a man committeth buggery with man or beast, it is felony.

Where any persons, above the number of twelve, shall assemble themselves with intent to put down inclosures, or bring down prices of victuals, *etc.* and do not depart after proclamation, it is felony.

Where a man shall use any words to encourage or draw any people together, *ut supra*, and they do assemble accordingly, and do not depart after proclamation, it is felony.

Where a man being the King's sworn servant, conspireth to murder any lord of the realm or any of the privy council, it is felony.

Where a soldier hath taken any parcel of the king's wages, and departeth without licence, it is felony.

Where a man receiveth a seminary priest, knowing him to be such a priest, it is felony.

Where a recusant, which is a seducer, and persuader, and inciter of the King's subjects against the King's authority in ecclesiastical causes, or a persuader of

conventicles, *&c.* shall refuse to abjure the realm, it is felony.

Where vagabonds be found in the realm, calling themselves Egyptians, it is felony.

Where a purveyor taketh without warrant, or otherwise doth offend against certain special laws, it is felony.

Where a man hunteth in any forest, park, or warren, by night or by day, with vizards or other disguisements, and is examined thereof and concealeth his fact, it is felony.

Where a man stealeth certain kinds of hawks, it is felony.

Where a man committeth forgery the second time, having been once before convicted, it is felony.

Where a man transporteth rams or other sheep out of the King's dominions, the second time, it is felony.

Where a man being imprisoned for felony, breaks prison, it is felony.

Where a man procureth or consenteth to a felony to be committed, it is felony, as to make him accessary before the fact.

Where a man receiveth or relieveth a felon, knowing thereof, it is felony, as to make him accessary after the fact.

Where a woman, by the constraint of her husband, in his presence, joineth with him in committing of felony, it is not felony, neither as principal, nor as accessary.

The punishment, trial, and proceeding in cases of felony.

In felony, the corporal punishment is by hanging; and it is doubtful whether the King may turn it into beheading in the case of a Peer or other person of dignity, because in treason the striking off the head is part of the judgment, and so the King pardoneth the rest: but in felony it is no part of the judgment, and the King cannot alter the execution of law; yet precedents have been both ways.

In felony, there followeth corruption of blood, except it be in cases made felony by special statutes, with a proviso that there shall be no corruption of blood.

In felony, lands in fee simple and goods are forfeited, but not lands intailed, and the profits of estates for life are likewise forfeited: And by some customs lands in fee simple are not forfeited;

The father to the bough, son to the plough;

as in Gavelkind in Kent, and other places.

In felony, the escheats go to the lord of the fee, and not to the King, except he be lord: But the profits of estates for lives, or in tail during the life of tenant in tail, go to the King; and the King hath likewise, in fee simple lands holden of common lords, *annum, diem, et vastum.*

In felony, the lands are not in the King before office, nor in the lord before entry or recovery in writ of escheat, or death of the party attainted.

In felony, there can be no proceeding with the accessary before there be a proceeding with the principal; which principal if he die, or plead his pardon, or have his clergy before attainder, the accessaries can never be dealt with.

In felony, if the party stand mute, and will not put himself upon his trial, or challenge peremptorily above the number that the law allows, he shall have judgment not of hanging, but of penance of pressing to death; but then he saves his lands, and forfeits only his goods.

In felony, at the common law, the benefit of clergy or sanctuary was allowed; but now by statutes it is taken away in most cases.

In felony, bail may be admitted where the fact is not notorious, and the person not of evil fame.

In felony, no counsel is to be allowed to the party, no more than in treason.

In felony, no witness shall be received upon oath for the party's justification, no more than in treason.

In felony, if the fact be committed beyond the seas, or upon the seas, *super altum mare*, there is no trial

at all in the one case, nor by course of jury in the other case, but by the jurisdiction of the Admiralty.

In felony, if the party be *non sanæ memoriæ*, although it be after the fact, he cannot be tried nor adjudged, except it be in course of outlawry, and that is also erroneous.

In felony, the death of the party before conviction dischargeth all proceedings and forfeitures.

In felony, if the party be once acquitted, or in peril of judgment of life lawfully, he shall never be brought in question again for the same fact.

In felony, the prosecution may be either at the King's suit, by way of indictment, or at the party's suit, by way of appeal; and if it be by way of appeal, the defendant shall have his counsel, and produce witnesses upon oath, as in civil causes.

In felony, the King may grant *hault justice* to a subject, with the regality of power to pardon it.

In felony, the trial of Peers is all one as in case of treason.

In felony, the proceedings are in the King's bench, or before Commissioners of *Oyer* and *Terminer*, or of gaol delivery, and in some cases before justices of peace.

Cases of Felonia de se, *with the punishment, trial, and proceeding therein.*

In the civil law, and other laws, they make a difference of cases of *felonia de se:* for where a man is called in question upon any capital crime, and killeth himself to prevent the law, they give the same judgment in all points of forfeiture, as if they had been attainted in their life-time: And on the other side, where a man killeth himself upon impatience of sickness or the like, they do not punish it at all: but the law of England taketh it all in one degree, and punisheth it only with loss of goods to be forfeited to the King, who generally granteth them to his Almoner, where they be not formerly granted unto special liberties.

OFFENCES OF PRÆMUNIRE.

Cases of Præmunire.

WHERE a man purchaseth or accepteth any pro-
sion, that is, collation of any spiritual benefice or
ing, from the see of Rome, it is case of præmu-
re.

Where a man shall purchase any process to draw
y people of the King's allegiance out of the realm,
plea, whereof the cognisance pertains to the King's
urt, and cometh not in person to answer his con-
mpt in that behalf before the King and his council,
in his chancery, it is case of præmunire.

Where a man doth sue in any court which is not
e King's court, to defeat or impeach any judgment
ven in the King's court, and doth not appear to an-
er his contempt, it is case of præmunire.

Where a man doth purchase or pursue in the court
Rome, or elsewhere, any process, sentence of ex-
mmunication, bull, instrument, or other thing which
uches the King in his regality, or his realm in pre-
dice, it is case of præmunire.

Where a man doth affirm or maintain any foreign
thority of jurisdiction spiritual, or doth put in use
execute any thing for the advancement or setting
th thereof; such offence, the second time commit-
d, is case of præmunire.

Where a man refuseth to take the oath of supre-
acy, being tendered by the bishop of the diocese, if
be an ecclesiastical person; or by commission out
the chancery, if he be a temporal person, it is case
præmunire.

Where the dean and chapter of any church, upon
e *Congé d'elire* of an archbishop or bishop, doth
fuse to elect any such archbishop or bishop as is
minated unto them in the King's letters missive, it
case of præmunire.

Where a man doth contribute or give relief unto any
esuit or seminary priests, or to any college of Jesuits

or seminary priests, or to any person brought up therein, and called home, and not returning, it is case of præmunire.

Where a man is broker of an usurious contract above ten in the hundred, it is case of præmunire.

The punishment, trial, and proceedings in cases of præmunire.

The punishment is by imprisonment during life, forfeiture of goods, forfeiture of lands in fee-simple, and forfeiture of the profits of lands intailed, or for life.

The trial and proceeding is as in cases of misprision of treason; and the trial is by peers, where a peer of the realm is the offender.

OFFENCES OF ABJURATION AND EXILE.

Cases of abjuration and exile, and the proceedings therein.

WHERE a man committeth any felony, for the which at this day he may have privilege of sanctuary, and taketh sanctuary, and confesseth the felony before the coroner, he shall abjure the liberty of the realm, and choose his sanctuary; and if he commit any new offence, or leave his sanctuary, he shall lose the privilege thereof, and suffer as if he had not taken sanctuary.

Where a man not coming to the church, and, being a popish recusant, doth persuade any of the King's subjects to impugn his Majesty's authority in causes ecclesiastical, or shall persuade any subject from coming to church, or receiving the communion, or persuade any subject to come to any unlawful conventicles, or shall be present at any such unlawful conventicles, and shall not after conform himself within a time, and make his submission, he shall abjure the realm, and forfeit his goods and lands during life; and if he depart not within the time prefixed, or return, he shall be in the degree of a felon.

Where a man being a popish recusant, and not having lands to the value of twenty marks *per annum*, nor goods to the value of 40*l.* shall not repair to his dwelling or place where he was born, and there confine himself within the compass of five miles, he shall abjure the realm; and if he return, he shall be in the degree of a felon.

Where a man kills the King's deer in chases or forests, and can find no sureties after a year's imprisonment, he shall abjure the realm.

Where a man is a trespasser in parks, or in ponds of fish, and after three years imprisonment cannot find sureties, he shall abjure the realm.

Where a man is a ravisher of any child within age, whose marriage belongs to any person, and marrieth the said child after years of consent, and is not able to satisfy for the marriage, he shall abjure the realm.

OFFENCE OF HERESY.

Cases of heresy, and the trial and proceeding therein.

THE declaration of heresy, and likewise the proceeding and judgment upon heretics, is by the common laws of this realm referred to the jurisdiction ecclesiastical, and the secular arm is reached unto them by the common laws, and not by any statute for the execution of them by the King's writ *de hæretico comburendo.*

CASES OF THE KING'S PREROGATIVE.

The King's prerogative in Parliament.

1. THE King hath an absolute negative voice to all bills that pass the parliament, so as without his royal assent they have a mere nullity, and not so much as *authoritas præscripta*, as *senatus consulta* had, notwithstanding the intercession of tribunes.

2. The King may summon parliaments, dissolve them, adjourn and prorogue them at his pleasure.

3. The King may add voices in parliament at his pleasure, for he may give privileges to borough towns, and call and create barons at his pleasure.

4. No man can sit in parliament unless he take the oath of allegiance.

The King's prerogative in war and peace.

1. The King hath power to declare and proclaim war, and make and conclude peace.

2. The King hath power to make leagues and confederacies with foreign estates, more or less strait, and to revoke and disannul them at his pleasure.

3. The King hath power to command the bodies of his subjects for service of his wars, and to muster, train, and levy men, and to transport them by sea or land at his pleasure.

4. The King hath power in time of war to execute martial law, and to appoint all officers of war at his pleasure.

5. The King hath power to grant his letters of mart and reprisal for remedy to his subjects upon foreign wrongs.

6. The King may give knighthood, and thereby enable any subject to perform knight's service.

The King's prerogative in matter of money.

1. The King may alter his standard in baseness or fineness.

2. The King may alter his stamp in the form of it.

3. The King may at his pleasure alter the valuations, and raise and fall monies.

4. The King may by proclamation make monies of his own current or not.

5. The King may take or refuse the subjects bullion, or coin for more or less money.

6. The King by proclamation may make foreign money current, or not.

The King's prerogative in matters of trade and traffick.

1. The King may constrain the person of any of his subjects not to go out of the realm.

2. The King may restrain any of his subjects to go out of the realm in any special part foreign.

3. The King may forbid the exportation of any commodities out of the realm.

4. The King may forbid the importation of any commodities into this realm.

5. The King may set a reasonable impost upon any foreign wares that come into the realm, and so of native wares that go out of the realm.

The King's prerogative in the persons of his subjects.

1. The King may create any corporation or body politic, and enable them to purchase, to grant, to sue, and be sued; and with such restrictions and limitations as he pleases.

2. The King may denizen and enable any foreigner for him and his descendents after the charter; though he cannot naturalise, nor enable him to make pedigree from ancestors paramount.

3. The King may enable any attainted person, by his charter of pardon, and purge the blood for time to come, though he cannot restore the blood for the time past.

4. The King may enable any dead persons in the law, as men professed in religion, to take and purchase to the King's benefit.

A twofold power of the law.

1. A Direction: In this respect the King is underneath the law; because his acts are guided thereby.

2. Correction: In this respect the King is above the law; for it may not correct him for any offence.

A twofold power in the King.

1. His absolute power, whereby he may levy for
against any nation.

2. His limited power, which is declared and e
pressed in the laws what he may do.

AN

EXPLANATION

WHAT MANNER OF PERSONS THOSE SHOULD BE,

That are to execute the Power or Ordinance of the

KING'S PREROGATIVE.

THAT absolute prerogative, according to the ng's pleasure, revealed by his laws, may be exer- ed and executed by any subject, to whom power y be given by the King, in any place of judgment commission, which the King by his law hath or- ned: in which the judge subordinate cannot wrong people, the law laying down a measure by which ry judge should govern and execute; against which if any judge proceed, he is by the law question- e, and punishable for his transgression.

In this nature are all the judges and commissioners the land, no otherwise than in their courts, in which King in person is supposed to sit, who cannot ke that trespass, felony, or treason, which the law th not made so to be, neither can punish the guilty other punishment than the laws have appointed.

This prerogative or power as it is over all the sub- ts, so being known by the subjects, they are with- t excuse if they offend, and suffer no wrong if they justly punished; and by this prerogative the King verneth all sorts of people according unto known ll.

2. The absolute prerogative, which is in Kings ac- rding to their private will and judgment, cannot be ecuted by any subject; neither is it possible to give ch power by commission; or fit to subject the people the same; for the King, in that he is the substitute God immediately, the father of his people, and head

of the commonwealth, hath, by participation with God, and with his subjects, a discretion, judgment, and feeling love towards those, over whom he reigneth, only proper to himself, or to his place and person; who, seeing he cannot in any others infuse his wisdom, power, or gifts, which God, in respect of his place and charge, hath enabled him withal, can neither subordinate any other judge to govern by that knowledge, which the King can no otherwise, than by his known will, participate unto him: and if any such subordinate judge shall obtain commission according to the discretion of such judge to govern the people, that judge is bound to think that to be his soundest discretion, which the law, in which is the King's known will, sheweth unto him to be that justice which he ought to administer; otherwise he might seem to esteem himself above the King's law, who will not govern by it, or to have a power derived from other than from the King, which in the kingdom will administer justice contrary unto the justice of the land: neither can such a judge or commissioner under the name of the King's authority shroud his own high action, seeing the conscience and discretion of every man is particular and private to himself, so as the discretion of the judge cannot be properly or possibly the discretion or the conscience of the King; and if not his discretion, neither the judgment that is ruled by another man's only.

Therefore it may seem they rather desire to be Kings, than to rule the people under the King, which will not administer justice by law, but by their own will.

3. This administration in a subject is derogative to the King's prerogative; for he administereth justice out of a private direction, being not capable of a general direction how to use the King's subjects at pleasure, in causes of particular respect; which if no other than the King himself can do, how can it be so that any man should desire that which is unfit and impossible, but that it must proceed out of some exorbitant affection? the rather, seeing such places be full of trouble and altogether unnecessary, no man will seek

to thrust himself into them but for hopes of gain. Then is not any prerogative oppugned, but maintained, though it be desired, that every subordinate magistrate may not be made supreme, whereby he may seize upon the hearts of the people, take from the King the respect due unto him only, or judge the people otherwise than the King doth himself.

4. And although the Prince be not bound to render any account to the law, which in person he administreth himself, yet every subordinate judge must render an account to the King, by his laws, how he hath administered justice in his place where he is set. But if he hath power to rule by private direction, for which there is no law, how can he be questioned by a law, if in his private censure he offends?

5. Therefore, it seemeth, that in giving such authority, the King ordaineth not subordinate magistrates, but absolute Kings: and what doth the King leave to himself, who giveth so much to others, as he hath himself? Neither is there a greater bond to tie the subject to his Prince in particular, than when he shall have recourse unto him, in his person, or in his power, for relief of the wrongs which from private men be offered; or for reformation of the oppressions which any subordinate magistrate shall impose upon the people. There can be no offence in the judge, who hath power to execute according to his discretion, when the discretion of any judge shall be thought fit to be limited, and therefore there can be therein no reformation; whereby the King in this useth no prerogative to gain his subjects right; then the subject is bound to suffer helpless wrong; and the discontent of the people is cast upon the King; the laws being neglected, which with their equity in all other causes and judgments, saving this, interpose themselves and yield remedy.

6. And to conclude, custom cannot confirm that which is any ways unreasonable of itself.

Wisdom will not allow that, which is many ways dangerous, and no ways profitable.

Justice will not approve that government, where it cannot be but wrong must be committed.

Neither can there be any rule by which to try it, nor means of reformation of it.

7. Therefore, whosoever desireth government must seek such as he is capable of, not such as seemeth to himself most easy to execute; for it is apparent, that it is easy to him that knoweth not law nor justice, to rule as he listeth, his will never wanting a power to itself: but it is safe and blameless, both for the judge and people, and honour to the King, that judges be appointed who know the law, and that they be limited to govern according to the law.

THE

OFFICE OF CONSTABLES,

ORIGINAL AND USE OF

COURTS LEET, SHERIFF'S TURN, etc.

WITH

The Answers to the Questions propounded by Sir Alexander Hay, Knt. touching the Office of Constables. A. D. 1608.

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1. Question. *What is the original of constables?*

Answer. To the first question of the original of constables it may be said, *caput inter nubila condit;* for the authority was granted upon the ancient laws and customs of this kingdom practised long before the Conquest, and intended and executed for conservation of peace, and repression of all manner of disturbance and hurt of the people, and that as well by way of prevention as punishment; but yet so, as they have no judicial power, to hear and determine any cause, but only a ministerial power, as in the answer to the seventh article is demonstrated.

As for the office of high or head constable, the original of that is yet more obscure; for though the high-constable's authority hath the more ample circuit, he being over the hundred, and the petty-constable over the village; yet I do not find that the petty-constable is subordinate to the high-constable, or to be ordered or commanded by him; and therefore, I doubt, the high-constable was not *ab origine;* but that when the business of the county increased, the authority of justices of peace was enlarged by divers statutes, and then, for conveniency sake, the office of high-constable grew in use for the receiving of the commandments and prescripts from the justices of peace, and distributing them to the petty-

constables: and in token of this, the election of high-constable in most parts of the kingdom is by the appointment of the justices of the peace, whereas the election of the petty-constable is by the people.

But there are two things unto which the office of constables hath special reference, and which of necessity, or at least a kind of congruity, must precede the jurisdiction of that office; either the things themselves, or something that hath a similitude or analogy towards them.

1. The division of the territory, or gross of the shires, into hundreds, villages, and towns; for the high-constable is officer over the hundred, and the petty-constable is over the town or village.

2. The court-leet, unto which the constable is attendant and minister; for there the constables are chosen by the jury, there sworn, and there that part of their office which concerneth information is principally to be performed: for the jury being to present offences and offenders, are chiefly to take light from the constable of all matters of disturbance and nuisance of the people: which they, in respect of their office, are presumed to have best and most particular knowledge of.

The jurisdiction of the court-leet, is to three ends.

1. To take the ancient oath of allegiance of all males above twelve years.

2. To inquire of all offences against the peace; and for those that are against the crown and peace both, to inquire of only, and certify to the justices of gaol delivery; but those that are against the peace simply, they are to inquire of and punish.

3. To inquire of, punish, and remove all public nuisances and grievances concerning infection of air, corruption of victuals, ease of chaffer, and contract of all other things that may hurt or grieve the people in general, in their health, quiet, and welfare.

And to these three ends, as matters of policy subordinate, the court-leet hath power to call upon the pledges that are to be taken of the good behaviour of the resiants that are not tenants, and to inquire of all

defaults of officers, as constables, ale-tasters, and the like: and likewise for the choice of constables, as was said.

The jurisdiction of these leets is either remaining in the King, and in that case exercised by the sheriff in his Turn, which is the grand leet, or granted over to subjects; but yet it is still the King's court.

2. Quest. *Concerning the election of constables?*

Answ. The election of the petty-constable, as was said, is at the court-leet by the inquest that make the presentments; and election of head constables is by the justices of the peace at their quarter sessions.

3. Quest. *How long is their office?*

Answ. The office of constable is annual, except they be removed.

4. Quest. *Of what rank or order of men are they?*

Answ. They be men, as it is now used, of inferior, yea of base condition, which is a mere abuse or degenerating from the first institution; for the petty-constables in towns ought to be of the better sort of resiants in the same; save that they be not aged or sickly, but of able bodies in respect of keeping watch and toil of their place; nor must they be in any man's livery. The high-constables ought to be of the ablest free-holders, and substantialest sort of yeomen, next to the degree of gentlemen; but should not be incumbered with any other office, as mayor of a town, under-sheriff, bailiff, *etc.*

5. Quest. *What allowance have the constables?*

Answ. They have no allowance, but are bound by duty to perform their office *gratis;* which may the rather be endured because it is but annual, and they are not tied to keep or maintain any servants or under-ministers, for that every one of the King's people within their limits are bound to assist them.

6. Quest. *What if they refuse to do their office?*

Answ. Upon complaint made of their refusal to any one justice of peace, the said justice may bind them over to the sessions, where, if they cannot excuse themselves by some allegation that is just, they may be fined and imprisoned for their contempt.

7. Quest. *What is their authority or power?*

Answ. The authority of the constable, as it is substantive, and of itself, or substituted, and astricted to the warrants and commands of the justices of the peace; so again it is original, or additional: for either it was given them by the common law, or else annexed by divers statutes. And as for subordinate power, wherein the constable is only to execute the commands of the justices of peace, likewise the additional power which is given by divers statutes, it is hard to comprehend in any brevity; for that they do correspond to the office and authority of justices of peace, which is very large, and are created by the branches of several statutes: but for the original and substantive power of constables, it may be reduced to three heads; namely,

1. For matter of peace only.
2. For peace and the crown.
3. For matter of nuisance, disturbance, and disorder, although they be not accompanied with violence and breach of the peace.

First, for pacifying of quarrel begun, the constable may, upon hot words given or likelihood of breach of the peace to ensue, command them in the King's name to keep peace, and depart, and forbear: and so he may, where an affray is made, part the same, and keep the parties asunder, and arrest and commit the breakers of the peace, if they will not obey; and call power to assist him for that purpose.

For punishment of breach of peace past, the law is very sparing in giving any authority to constables, because they have not power judicial, and the use of his office is rather for preventing or staying of mischief, than for punishment of offences; for in that part he is rather to execute the warrants of the justices; or, when sudden matter ariseth upon his view, or notorious circumstances, to apprehend offenders, and to carry them before the justices of peace, and generally to imprison in like cases of necessity, where the case will not endure the present carrying of the party before the justices. And so much for peace.

Secondly, For matters of the crown, the office of the constable consisteth chiefly in these four parts:

1. To arrest.
2. To make hue and cry.
3. To search.
4. To seise goods.

All which the constable may perform of his own authority, without any warrant from the justices of the peace.

1. For, first, if any man will lay murder or felony to another's charge, or do suspect him of murder or felony, he may declare it to the constable, and the constable ought, upon such declaration or complaint, to carry him before a justice of peace; and if by common voice or fame any man be suspected, the constable of duty ought to arrest him, and bring him before a justice of peace, though there be no other accusation or declaration.

2. If any house be suspected for receiving or harbouring of any felon, the constable, upon complaint or common fame, may search.

3. If any fly upon the felony, the constable ought to raise hue and cry.

4. And the constable ought to seise his goods, and keep them safe without impairing, and inventary them in presence of honest neighbours.

Thirdly, for matters of common nuisance and grievances, they are of very variable nature, according to the several comforts which man's life and society requireth, and the contraries which infest the same.

In all which, be it matter of corrupting air, water, or victuals, stopping, straitening, or indangering of passages, or general deceits in weights, measures, sizes, or counterfeiting wares, and things vendible; the office of constable is to give, as much as in him lies, information of them, and of the offenders, in leets, that they may be presented; but because leets are kept but twice in the year, and many of those things require present and speedy remedy, the constable, in things notorious and of vulgar nature, ought to forbid and repress them in the mean time: if not, they are

for their contempt to be fined and imprisoned, or both, by the justices in their sessions.

8. Quest. *What is their oath?*

Answ. The manner of the oath they take is as followeth:

"You shall swear that you shall well and truly "serve the King, and the lord of this law-day; and "you shall cause the peace of our sovereign lord the "King well and truly to be kept to your power: and "you shall arrest all those that you see committing "riots, debates, and affrays in breach of peace: and "you shall well and truly endeavour yourself to your "best knowledge, that the statute of Winchester "for watching, hue and cry, and the statutes made "for the punishment of sturdy beggars, vagabonds, "rogues, and other idle persons coming within your "office be truly executed, and the offenders be pu-"nished: and you shall endeavour, upon complaint "made, to apprehend barreters and riotous persons "making affrays, and likewise to apprehend felons; "and if any of them make resistance with force, and "multitude of misdemeanors, you shall make out-cry "and pursue them till they be taken; and shall look "unto such persons as use unlawful games; and you "shall have regard unto the maintenance of artillery; "and you shall well and truly execute all process and "precepts sent unto you from the justices of the "peace of the county; and you shall make good and "faithful presentments of all bloodsheds, out-cries, "affrays, and rescues made within your office: "and you shall well and truly, according to your "own power and knowledge, do that which belong-"eth to your office of constable to do, for this year to "come. So help," *etc.*

9. Quest. *What difference is there betwixt the high-constables and petty-constables?*

Answ. Their authority is the same in substance, differing only in the extent; the petty-constable serving only for one town, parish, or borough; the head-constable for the whole hundred: nor is the petty-constable subordinate to the head-constable for any com-

mandment that proceeds from his own authority; but it is used, that the precepts of the justices be delivered unto the high-constables, who being few in number, may better attend the justices, and then the head-constables, by virtue thereof, make their precepts over to the petty-constables.

10. Quest. *Whether a constable may appoint a deputy?*

Answ. In case of necessity a constable may appoint a deputy, or in default thereof, the steward of the court-leet may; which deputy ought to be sworn before the said steward.

The constable's office consists in three things:

1. Conservation of the peace.
2. Serving precepts and warrants.
3. Attendance for the execution of statutes.

Of the jurisdiction of Justices itinerant in the principality of Wales.

1. THEY have power to hear and determine all criminal causes, which are called, in the laws of England, pleas of the crown; and herein they have the same jurisdiction that the justices have in the court of the King's bench.

2. They have power to hear and determine all civil causes, which in the laws of England are called common-pleas, and to take knowledge of all fines levied of lands or hereditaments, without suing any *dedimus potestatem;* and herein they have the same jurisdiction that the justices of the common-pleas do execute at Westminster.

3. They have power also to hear and determine all assizes upon disseisin of lands or hereditaments, wherein they equal the jurisdiction of the justices of assize.

4. Justices of *oyer* and *terminer* therein may hear all notable violences and outrages perpetrated within their several precincts in the said principality of Wales.

The Prothonotary's office is to draw all pleadings, and entereth and ingrosseth all the records and judgments in all trivial causes.

These offices are in the King's gift.

The Clerk of the crown, his office is to draw and ingross all proceedings, arraignments, and judgments in criminal causes.

These offices are in the judges disposition.

The Marshal's office is to attend the persons of the judges at their coming, sitting, and going from their sessions or court.

The Crier is *tanquam publicus præco,* to call for such persons whose appearances are necessary, and to impose silence to the people.

The Office of Justice of Peace.

The office of justice of peace.

THERE is a commission under the great seal of England to certain gentlemen, giving them power to preserve the peace, and to resist and punish all turbulent persons, whose misdemeanors may tend to the disquiet of the people; and these be called justices of the peace, and every of them may well and truly be called *Eirenarcha.*

The chief of them is called *Custos rotulorum,* in whose custody all the records of their proceedings are resident.

Others there are of that number called Justices of peace and *quorum,* because in their commission they have power to sit and determine causes concerning breach of peace and misbehaviour. The words of their commission are conceived thus, *Quorum,* such and such, *unum vel duos, etc. esse volumus;* and without some one or more of the *quorum,* no sessions can be holden; and for the avoiding of a superfluous number of such justices, (for through the ambition of many it is counted a credit to be burthened with that authority,) the statute of 38 H. VIII. hath expressly prohibited that there shall be but eight justices of the peace in every county. These justices hold their sessions quarterly.

Justices of peace appointed by the lord keeper.

In every shire where the commission of the peace is established, there is a Clerk of the peace for the entering and ingrossing of all proceedings before the said justices. And this officer is appointed by the *custos rotulorum.*

The Office of Sheriffs.

EVERY shire hath a sheriff, which word, being of the Saxon English, is as much as to say shire-reeve, or minister of the county: his function or office is twofold, namely,

1. Ministerial.
2. Judicial.

1. He is the minister and executioner of all the process and precepts of the courts of law, and therefore ought to make return and certificate. 34 H. 8. cap. 16.

2. The sheriff hath authority to hold two several courts of distinct natures: 1. The *turn*, because he keepeth his turn and circuit about the shire, holdeth the same court in several places, wherein he doth inquire of all offences perpetrated against the common law, and not forbidden by any statute or act of parliament; and the jurisdiction of this court is derived from justice distributive, and is for criminal offences, and held twice every year.

2. The *County Court*, wherein he doth determine all petty and small causes civil under the value of forty shillings, arising within the said county, and therefore it is called the county court.

The jurisdiction of this court is derived from justice commutative, and is held every month. The office of the sheriff is annual, and in the King's gift, whereof he is to have a patent.

The Office of Escheator.

EVERY shire hath an officer called an Escheator, which is to attend the King's revenue, and to seize into his Majesty's hands all lands escheated, and goods or lands forfeited, and therefore is called escheator; and he is to inquire by good inquest of the death of the King's tenant, and to whom the lands are descended, and to seize their bodies and lands for ward, if they be within age, and is acountable for the same; he is named or appointed by the lord treasurer of England.

The Office of Coroner.

TWO other officers there are in every county called Coroners; and by their office they are to inquest in what manner, and by whom every person dying of a violent death, came so to their death; and to enter the same of record; which is matter criminal, and a plea of the crown: and therefore they are called coroners, or crowners, as one hath written, because their inquiry ought to be *in corona populi.*

These officers are chosen by the freeholders of the shire, by virtue of a writ out of the chancery *de coronatore eligendo:* and of them I need not to write more, because these officers are in use every where.

General Observations touching Constables, Gaolers, and Bailiffs.

FORASMUCH as every shire is divided into hundreds, there are also by the statute of 34 H. VIII. cap. 26. ordered and appointed, that two sufficient gentlemen or yeomen shall be appointed constables of every hundred.

Also there is in every shire a gaol or prison appointed for the restraint of liberty of such persons as for their offences are thereunto committed, until they shall be delivered by course of law.

In every hundred of every shire the sheriff thereof shall nominate sufficient persons to be bailiffs of that hundred, and under-ministers of the sheriffs: and they are to attend upon the justices in every of their courts and sessions.

Note. Archbishop Sancroft notes on this last chapter, written, say some, by Sir John Dodderidge, one of the justices of the King's-bench, 1608.

THE

ARGUMENT

OF

SIR FRANCIS BACON, KNIGHT,

HIS MAJESTY'S SOLICITOR GENERAL,

IN THE CASE OF

THE POST-NATI OF SCOTLAND,

IN THE EXCHEQUER CHAMBER,

BEFORE THE LORD CHANCELLOR, AND ALL THE JUDGES OF ENGLAND.

May it please your Lordships,

THIS case your lordships do well perceive to be of exceeding great consequence. For whether you do measure that by place, that reacheth not only to the realm of England, but to the whole island of Great Britain; or whether you measure that by time, that extendeth not only to the present time, but much more to future generations,

Et nati natorum, et qui nascentur ab illis:

And therefore as that is to receive at the bar a full and free debate, so I doubt not but that shall receive from your lordships a sound and just resolution according to law, and according to truth. For, my lords, though he were thought to have said well, that said that for his word, *Rex fortissimus;* yet he was thought to have said better, even in the opinion of the King himself, that said, *Veritas fortissima, et prævalet:* And I do much rejoice to observe such a concurrence in the whole carriage of this cause to this end, that truth may prevail.

The case no feigned or framed case; but a true case between true parties.

The title handled formerly in some of the King's courts, and free-hold upon it; used indeed by his Majesty in his high wisdom to give an end to this great question, but not raised; *occasio*, as the schoolmen say, *arrepta, non porrecta*.

The case argued in the King's-bench by Mr. Walter with great liberty, and yet with good approbation of the court: the persons assigned to be of counsel on that side, inferior to none of their quality and degree in learning; and some of them most conversant and exercised in the question.

The judges in the King's bench have adjourned it to this place for conference with the rest of their brethren. Your lordship, my lord Chancellor, though you be absolute judge in the court where you sit, and might have called to you such assistance of judges as to you had seemed good; yet would not forerun or lead in this case by any opinion there to be given; but have chosen rather to come yourself to this assembly; all tending, as I said, to this end, whereunto I for my part do heartily subscribe, *ut vincat veritas*, that truth may first appear, and then prevail. And I do firmly hold, and doubt not but I shall well maintain, that this is the truth, that Calvin the plaintiff is *ipso jure* by the law of England a natural born subject, to purchase freehold, and to bring real actions within England. In this case I must so consider the time, as I must much more consider the matter. And therefore though it may draw my speech into farther length; yet I dare not handle a case of this nature confusedly, but purpose to observe the ancient and exact form of pleadings; which is,

First, to explain or induce.

Then, to confute, or answer objections.

And lastly, to prove, or confirm.

AND first for explanation. The outward question in this case is no more, but, Whether a child, born in Scotland since his Majesty's happy coming to the crown of England, be naturalized in England, or no? But the inward question or state of the question ever-

more beginneth where that which is confessed on both sides doth leave.

It is confessed, that if these two realms of England and Scotland were united under one law and one parliament, and thereby incorporated and made as one kingdom, that the *Post-natus* of such an union should be naturalized.

It is confessed, that both realms are united in the person of our sovereign; or, because I will gain nothing by surreption, in the putting of the question, that one and the same natural person is King of both realms.

It is confessed, that the laws and parliaments are several. So then, Whether this privilege and benefit of naturalization be an accessory or dependency upon that which is one and joint, or upon that which is several, hath been, and must be the depth of this question. And therefore your lordships do see the state of this question doth evidently lead me by way of inducement to speak of three things: The King, the law, and the privilege of naturalization. For if you well understand the nature of the two principals, and again the nature of the accessory; then shall you discern, to whether principal the accessory doth properly refer, as a shadow to a body, or iron to an adamant.

And therefore your lordships will give me leave in a case of this quality, first to visit and open the foundations and fountains of reason, and not begin with the positions and eruditions of a municipal law; for so was that done in the great case of mines; and so ought that to be done in all cases of like nature. And this doth not at all detract from the sufficiency of our laws, as incompetent to decide their own cases, but rather addeth a dignity unto them, when their reason appearing as well as their authority doth shew them to be as fine moneys, which are current not only by the stamp, because they are so received, but by the natural metal, that is, the reason and wisdom of them.

And master Littleton himself in his whole book doth commend but two things to the professors of the law by the name of his sons; the one, the inquiring

and searching out the reasons of the law; and the other, the observing of the forms of pleadings. And never was there any case that came in judgment that required more, that Littleton's advice should be followed in those two points, than doth the present case in question. And first of the King.

It is evident that all other commonwealths, monarchies only excepted, do subsist by a law precedent. For where authority is divided amongst many officers, and they not perpetual, but annual or temporary, and not to receive their authority but by election, and certain persons to have voice only to that election, and the like; these are busy and curious frames, which of necessity do pre-suppose a law precedent, written or unwritten, to guide and direct them: but in monarchies, especially hereditary, that is, when several families, or lineages of people do submit themselves to one line, imperial or royal, the submission is more natural and simple, which afterwards by laws subsequent is perfected and made more formal; but that is grounded upon nature. That this is so, it appeareth notably in two things; the one the platforms and patterns which are found in nature of monarchies; the original submissions, and their motives and occasions. The platforms are three:

The first is that of a father, or chief of a family; who governing over his wife by prerogative of sex, over his children by prerogative of age, and because he is author unto them of being, and over his servants by prerogative of virtue and providence (for he that is able of body, and improvident of mind, is *natura servus*) that is the very model of a King. So is the opinion of Aristotle, lib. iii. *Pol.* cap. 14. where he saith, *Verum autem regnum est, cum penes unum est rerum summa potestas: quod regnum procurationem familiæ imitatur.*

And therefore Lycurgus, when one counselled him to dissolve the kingdom, and to establish another form of estate, answered, "Sir, begin to do that which you "advise first at home in your own house:" noting, that the chief of a family is as a King; and that those

that can least endure Kings abroad, can be content to be Kings at home. And this is the first platform, which we see is merely natural.

The second is that of a shepherd and his flock, which, Xenophon saith, Cyrus had ever in his mouth. For shepherds are not owners of the sheep; but their office is to feed and govern: no more are Kings proprietaries or owners of the people: for God is sole owner of people. *The nations*, as the Scripture saith, *are his inheritance:* but the office of Kings is to govern, maintain, and protect people. And that is not without a mystery, that the first king that was instituted by God, David, for Saul was but an untimely fruit, was translated from a shepherd, as you have it in Psalm lxxviii. *Et elegit David servum suum, de gregibus ovium sustulit eum,—pascere Jacob servum suum, et Israel hæreditatem suam.* This is the second platform; a work likewise of nature.

The third platform is the government of God himself over the world, whereof lawful monarchies are a shadow. And therefore both amongst the Heathen, and amongst the Christians, the word, sacred, hath been attributed unto Kings, because of the conformity of a monarchy with a divine Majesty: never to a senate or people. And so you find it twice in the lord Coke's Reports; once in the second book, the bishop of Winchester's case; and his fifth book, Cawdrie's case; and more anciently in the 10 of H. VII. fol. 18. *Rex est persona mixta cum sacerdote;* an attribute which the senate of Venice, or a canton of Swisses, can never challenge. So, we see, there be precedents or platforms of monarchies, both in nature, and above nature; even from the monarch of heaven and earth to the king, if you will, in an hive of bees. And therefore other states are the creatures of law: and this state only subsisteth by nature.

For the original submissions, they are four in number: I will briefly touch them: The first is paternity or patriarchy, which was when a family growing so great as it could not contain itself within one habitation, some branches of the descendants were forced

to plant themselves into new families, which second families could not by a natural instinct and inclination but bear a reverence, and yield an obeisance to the eldest line of the ancient family from which they were derived.

The second is, the admiration of virtue, or gratitude towards merit, which is likewise naturally infused into all men. Of this Aristotle putteth the case well, when it was the fortune of some one man, either to invent some arts of excellent use towards man's life, or to congregate people, that dwelt scattered, into one place, where they might cohabit with more comfort, or to guide them from a more barren land to a more fruitful, or the like: upon these deserts, and the admiration and recompense of them, people submitted themselves.

The third, which was the most usual of all, was conduct in war, which even in nature induceth as great an obligation as paternity. For as men owe their life and being to their parents in regard of generation, so they owe that also to saviours in the wars in regard of preservation. And therefore we find in chap. xviii. of the book of Judges, ver. 22. *Dixerunt omnes viri ad Gideon, Dominare nostri, tu et filii tui, quoniam servasti nos de manu Madian.* And so we read when it was brought to the ears of Saul, that the people sung in the streets, *Saul hath killed his thousands, and David his ten thousand* of enemies, he said straightways: *Quid ei superest nisi ipsum regnum?* For whosoever hath the military dependence, wants little of being King.

The fourth is an inforced submission, which is conquest, whereof it seemed Nimrod was the first precedent, of whom it is said; *Ipse cœpit potens esse in terra, et erat robustus venator coram Domino.* And this likewise is upon the same root, which is the saving or gift as it were of life and being; for the conqueror hath power of life and death over his captives; and therefore where he giveth them themselves, he may reserve upon such a gift what service and subjection he will. All these four submissions are evident to be natural and more ancient than law.

To speak therefore of law, which is the second part of that which is to be spoken of by way of inducement. Law no doubt is the great organ by which the sovereign power doth move, and may be truly compared to the sinews in a natural body, as the sovereignty may be compared to the spirits: for if the sinews be without the spirits, they are dead and without motion; if the spirits move in weak sinews, it causeth trembling: so the laws, without the King's power, are dead; the King's power, except the laws be corroborated, will never move constantly, but be full of staggering and trepidation. But towards the King himself the law doth a double office or operation: the first is to intitle the King, or design him: and in that sense Bracton saith well, lib. 1. fol. 5. and lib. 3. fol. 107. *Lex facit quod ipse sit Rex;* that is, it defines his title; as in our law, That the kingdom shall go to the issue female; that it shall not be departable amongst daughters; that the half-blood shall be respected, and other points differing from the rules of common inheritance. The second is, that whereof we need not fear to speak in good and happy times, such as these are, to make the ordinary power of the King more definite or regular: for it was well said by a father, *plenitudo potestatis est plenitudo tempestatis.* And although the King, in his person, be *solutus legibus,* yet his acts and grants are limited by law, and we argue them every day.

But I demand, Do these offices or operations of law evacuate or frustrate the original submission, which was natural? Or shall it be said that all allegiance is by law? No more than it can be said, that *potestas patris,* the power of the father over the child, is by law; and yet no doubt laws do diversely define of that also; the law of some nations having given fathers power to put their children to death; others, to sell them thrice; others, to disinherit them by testament at pleasure, and the like. Yet no man will affirm, that the obedience of the child is by law, though laws in some points do make it more positive: and even so it is of allegiance of subjects to hereditary monarchs, which

is corroborated and confirmed by law, but is the work of the law of nature. And therefore you shall find the observation true, and almost general in all states, that their lawgivers were long after their first Kings, who governed for a time by natural equity without law: so was Theseus long before Solon in Athens: so was Eurytion and Sous long before Lycurgus in Sparta: so was Romulus long before the *Decemviri*. And even amongst ourselves there were more ancient Kings of the Saxons; and yet the laws ran under the name of Edgar's laws. And in the refounding of the kingdom in the person of William the Conqueror, when the laws were in some confusion for a time, a man may truly say, that King Edward I. was the first lawgiver, who enacting some laws, and collecting others, brought the law to some perfection. And therefore I will conclude this point with the stile which divers acts of parliaments do give unto the King: Which term him very effectually and truly, "our natural sovereign liege lord." And as it was said by a principal judge here present when he served in another place, and question was moved by some occasion of the title of Bullein's lands, that he would never allow that Queen Elizabeth (I remember it for the efficacy of the phrase) should be a statute Queen, but a common-law Queen: so surely I shall hardly consent that the King shall be esteemed or called only our rightful sovereign, or our lawful sovereign, but our natural liege sovereign; as acts of parliament speak: for as the common law is more worthy than the statute law; so the law of nature is more worthy than them both. Having spoken now of the King and the law, it remaineth to speak of the privilege and benefit of naturalization itself; and that according to the rules of the law of England.

Naturalization is best discerned in the degrees whereby the law doth mount and ascend thereunto. For it seemeth admirable unto me, to consider with what a measured hand and with how true proportions our law doth impart and confer the several degrees of this benefit. The degrees are four.

The first degree of persons, as to this purpose, that

the law takes knowledge of, is an alien enemy; that is, such a one as is born under the obeisance of a prince or state that is in hostility with the King of England. To this person the law giveth no benefit or protection at all, but if he come into the realm after war proclaimed, or war in fact, he comes at his own peril, he may be used as an enemy: for the law accounts of him, but, as the Scripture saith, as of a spy that comes to see the weakness of the land. And so it is in 2 Ric. III. fol. 2. Nevertheless this admitteth a distinction. For if he come with safe-conduct otherwise it is: for then he may not be violated, either in person or goods. But yet he must fetch his justice at the fountain-head, for none of the conduit pipes are open to him; he can have no remedy in any of the King's courts; but he must complain himself before the King's privy council: there he shall have a proceeding summary from hour to hour, the cause shall be determined by natural equity, and not by rules of law; and the decree of the council shall be executed by aid of the chancery, as in 13 Ed. IV. And this is the first degree

The second person is an alien friend, that is, such a one as is born under the obeisance of such a King or state as is confederate with the King of England, or at least not in war with him. To this person the law allotteth this benefit, that as the law accounts that the hold it hath over him, is but a transitory hold, for he may be an enemy, so the law doth indue him but with a transitory benefit, that is, of moveable goods and personal actions. But for free-hold, or lease, or actions real or mixt, he is not enabled, except it be in *autre droit*. And so it is 9 E. IV. fol. 7. 19 E. IV. fol. 6. 5 Mar. and divers other books.

The third person is a denizen, using the word properly, for sometimes it is confounded with a natural born subject. This is one that is but *subditus insitivus*, or *adoptivus*, and is never by birth, but only by the King's charter, and by no other mean, come he never so young into the realm, or stay he never so long.

Mansion or habitation will not indenize him, no, nor swearing obedience to the King in a leet, which doth in-law the subject; but only, as I said, the King's grace and gift. To this person the law giveth an ability and capacity abridged, not in matter, but in time. And as there was a time when he was not subject, so the law doth not acknowledge him before that time. For if he purchase free-hold after his denization, he may take it; but if he have purchased any before, he shall not hold it: so if he have children after, they shall inherit; but if he have any before, they shall not inherit. So as he is but privileged *a parte post*, as the schoolmen say, and not *a parte ante*.

The fourth and last degree is a natural born subject, which is evermore by birth, or by act of parliament; and he is complete and entire. For in the law of England there is *nil ultra*, there is no more subdivision or more subtile division beyond these: and therein it seemeth to me that the wisdom of the law, as I said, is to be admired both ways, both because it distinguisheth so far, and because it doth not distinguish farther. For I know that other laws do admit more curious distinction of this privilege; for the Romans had, besides *jus civitatis*, which answereth to naturalization, *jus suffragii*. For although a man were naturalized to take lands and inheritance, yet he was not enabled to have a voice at passing of laws, or at election of officers. And yet farther they have *jus petitionis*, or *jus honorum*. For though a man had voice, yet he was not capable of honour and office. But these be the devises commonly of popular or free estates, which are jealous whom they take into their number, and are unfit for monarchies; but by the law of England, the subject that is natural born hath a capacity or ability to all benefits whatsoever; I say capacity or ability: But to reduce *potentiam in actum*, is another case. For an earl of Ireland, though he be naturalized in England, yet hath no voice in the parliament of England, except he have either a call by writ, or creation by patent; but he is capable of either. But upon this quadripartite division of the ability of

persons I do observe to your lordships three things, being all effectually pertinent to the question in hand.

The first is, that if any man conceive that the reasons for the *Post-nati* might serve as well for the *Ante-nati*, he may by the distribution which we have made plainly perceive his error. For the law looketh not back, and therefore cannot, by any matter *ex post facto*, after birth, alter the state of the birth; wherein no doubt the law hath a grave and profound reason; which is this, in few words, *Nemo subito fingitur; aliud est nasci, aliud fieri:* we indeed more respect and affect those worthy gentlemen of Scotland whose merits and conversations we know; but the law that proceeds upon general reason, and looks upon no mens faces, affecteth and privilegeth those which drew their first breath under the obeisance of the King of England.

The second point is, that by the former distribution it appeareth that there be but two conditions by birth, either alien, or natural born, *nam tertium penitus ignoramus.* It is manifest then, that if the *Post-nati* of Scotland be not natural born, they are alien born, and in no better degree at all than Flemings, French, Italians, Spanish, Germans, and others, which are all at this time alien friends, by reason his Majesty is in peace with all the world.

The third point seemeth to me very worthy the consideration; which is, that in all the distributions of persons, and the degrees of abilities or capacities, the King's act is all in all, without any manner of respect to law or parliament. For it is the King that makes an alien enemy, by proclaiming a war, wherewith the law or parliament intermeddles not. So the King only grants safe-conducts, wherewith law and parliament intermeddle not. It is the King likewise that maketh an alien friend, by concluding a peace, wherewith law and parliament intermeddle not. It is the King that makes a denizen by his charter, absolutely of his prerogative and power, wherewith law and parliament intermeddle not. And therefore it is strongly to be inferred, that as all these degrees depend wholly upon

the King's act, and no ways upon law or parliament; so the fourth, although it cannot by the Kings patent, but by operation of law, yet that the law, in that operation, respecteth only the King's person, without respect of subjection to law or parliament. And thus much by way of explanation and inducement: which being all matter in effect confessed, is the strongest ground-work to that which is contradicted or controverted.

There followeth the confutation of the arguments on the contrary side.

THAT which hath been materially objected, may be reduced to four heads.

The first is, that the privilege of naturalization followeth allegiance, and that allegiance followeth the kingdom.

The second is drawn from that common ground, *cum duo jura concurrunt in una persona, æquum est ac si essent in duobus;* a rule, the words whereof are taken from the civil law; but the matter of it is received in all laws; being a very line or rule of reason, to avoid confusion.

The third consisteth of certain inconveniences conceived to ensue of this general naturalization, *ipso jure.*

The fourth is not properly an objection, but a preoccupation of an objection or proof on our part, by a distinction devised between countries devolute by descent, and acquired by conquest.

For the first, it is not amiss to observe that those who maintain this new opinion, whereof there is *altum silentium* in our books of law, are not well agreed in what form to utter and express that: for some said that allegiance hath respect to the law, some to the crown, some to the kingdom, some to the body politic of the King: so there is confusion of tongues amongst them, as it commonly cometh to pass in opinions that have their foundations in subtility and imagination of man's wit, and not in the ground of nature. But to leave their words, and to come to their proofs: they endeavour to prove this conceit by three manner of proofs:

first, by reason; then, by certain inferences out of statutes; and lastly, by certain book-cases, mentioning and reciting the forms of pleadings.

The reason they bring is this; that naturalization is an operation of the law of England; and so indeed it is, that may be the true *genus* of it.

Then they add, that granted, that the law of England is of force only within the kingdom and dominions of England, and cannot operate but where it is in force. But the law is not in force in Scotland, therefore that cannot endure this benefit of naturalization by a birth in Scotland.

This reason is plausible and sensible, but extremely erroneous. For the law of England, for matters of benefit or forfeitures in England, operateth over the world. And because it is truly said that *respublica continetur pœna et præmio,* I will put a case or two of either.

It is plain that if a subject of England had conspired the death of the King in foreign parts, it was by the common law of England treason. How prove I that? By the statute of 35 H. VIII. cap. 2. wherein you shall find no words at all of making any new case of treason which was not treason before, but only of ordaining a form of trial; *ergo,* it was treason before: and if so, then the law of England works in foreign parts. So of contempts, if the King send his privy seal to any subject beyond the seas, commanding him to return, and he disobey, no man will doubt but there is a contempt, and yet the fact enduring the contempt was committed in foreign parts.

Therefore the law of England doth extend to acts or matters done in foreign parts. So of reward, privilege or benefit, we need seek no other instance than the instance in question; for I will put you a case that no man shall deny, where the law of England doth work and confer the benefit of naturalization upon a birth neither within the dominions of the kingdom, nor King of England. By the statute of 25 E. III. which, if you will believe Hussey, is but a declaration of the common law, all children born in any parts of the world,

if they be of English parents continuing at that time as liege subjects to the King, and having done no act to forfeit the benefit of their allegiance, are *ipso facto* naturalized. Nay, if a man look narrowly into the law in this point, he shall find a consequence that may seem at the first strange, but yet cannot be well avoided; which is, that if divers families of English men and women plant themselves at Middleborough, or at Roan, or at Lisbon, and have issue, and their descendents do intermarry amongst themselves, without any intermixture of foreign blood; such descendents are naturalized to all generations: for every generation is still of liege parents, and therefore naturalized; so as you may have whole tribes and lineages of English in foreign countries.

And therefore it is utterly untrue that the law of England cannot operate or confer naturalization, but only within the bounds of the dominions of England.

To come now to their inferences upon statutes; the first is out of this statute which I last recited. In which statute it is said, that in four several places there are these words, "born within the allegiance of England;" or again, "born without the allegiance of "England," which, say they, applies the allegiance to the kingdom, and not to the person of the King. To this the answer is easy; for there is no trope of speech more familiar than to use the place of addition for the person. So we say commonly, the line of York, or the line of Lancaster, for the lines of the duke of York, or the duke of Lancaster.

So we say the possessions of Somerset or Warwick, intending the possessions of the dukes of Somerset or earls of Warwick. So we see earls sign, Salisbury, Northampton, for the earls of Salisbury or Northampton. And in the very same manner the statute speaks, allegiance of England, for allegiance of the King of England. Nay more, if there had been no variety in the penning of that statute, this collection had had a little more force; for those words might have been thought to have been used of purpose and in propriety; but you may find in three other several

places of the same statute, allegiance and obeisance of the King of England, and especially in the material and concluding place, that is to say, children whose parents were at the time of their birth at the faith and obeisance of the King of England. So that it is manifest by this indifferent and promiscuous use of both phrases, the one proper, the other improper, that no man can ground any inference upon these words without danger of cavillation.

The second statute out of which they infer, is a statute made in 32 Hen. VIII. touching the policy of strangers tradesmen within this realm. For the parliament finding that they did eat the Englishmen out of trade, and that they entertained no apprentices but of their own nation, did prohibit that they should receive any apprentice but the King's subjects. In which statute is said, that in nine several places there is to be found this context of words, "aliens born out "of the King's obedience;" which is pregnant, say they, and doth imply that there be aliens born within the King's obedience. Touching this inference, I have heard it said, *qui hæret in litera, hæret in cortice;* but this is not worthy the name of *cortex*, it is but *muscus corticis*, the moss of the bark. For it is evident that the statute meant to speak clearly and without equivocation, and to a common understanding. Now then there are aliens in common reputation, and aliens in precise construction of law; the statute then meaning not to comprehend Irishmen, or Jerseymen, or Calais-men, for explanation-sake, lest the word alien might be extended to them in a vulgar acceptance, added those further words, "born "out of the King's obedience." Nay, what if we should say, that those words, according to the received laws of speech, are no words of difference or limitation, but of declaration or description of an alien, as if it had been said, with a *videlicet*, aliens; that is, such as are born out of the King's obedience? they cannot put us from that construction. But sure I am, if the bark make for them, the pith makes for us; for the privilege of liberty which the statute means to

deny to aliens of entertaining apprentices, is denied to none born within the King's obedience, call them aliens or what you will. And therefore by their reason, a *Post-natus* of Scotland shall by that statute keep what stranger apprentices he will, and so is put in the degree of an English. The third statute out of which inference is made, is the statute of 14 E. III. *cap. solo*, which hath been said to be our very case; and I am of that opinion too, but directly the other way. Therefore to open the scope and purpose of that statute: After that the title to the crown of France was devolute to K. E. III. and that he had changed his stile, changed his arms, changed his seal, as his Majesty hath done, the subjects of England, saith the statute, conceived a fear that the realm of England might become subject to the realm of France, or to the King as King of France. And I will give you the reasons of the double fear, that it should become subject to the realm of France. They had this reason of fear; Normandy had conquered England, Normandy was feudal of France, therefore because the superior seigniory of France was now united in right with the tenancy of Normandy, and that England, in regard of the conquest, might be taken as a perquisite to Normandy, they had probable reason to fear that the kingdom of England might be drawn to be subject to the realm of France. The other fear, that England might become subject to the King as King of France, grew no doubt of this foresight, that the Kings of England might be like to make their mansion and seat of their estate in France, in regard of the climate, wealth, and glory of that kingdom; and thereby the kingdom of England might be governed hy the King's mandates and precepts issuing as from the King of France. But they will say, whatsoever the occasion was, here you have the difference authorised of subjection to a King generally, and subjection to a King as King of a certain kingdom: but to this I give an answer three-fold:

First, it presseth not the question; for doth any man say that a *Post-natus* of Scotland is naturalized in England, because he is a subject of the King as King

of England? No, but generally because he is the King's subject.

Secondly, The scope of this law is to make a distinction between crown and crown; but the scope of their argument is to make a difference between crown and person. Lastly, this statute, as I said, is our very case retorted against them; for this is a direct statute of separation, which presupposeth that the common law had made an union of the crowns in some degree, by virtue of the union in the King's person: if this statute had not been made to stop and cross the course of the common law in that point, as if Scotland now should be suitors to the King, that an act might pass to like effect, and upon like fear. And therefore if you will make good your distinction in this present case, shew us a statute for that. But I hope you can shew no statute of separation between England and Scotland. And if any man say that this was a statute declaratory of the common law, he doth not mark how that is penned: for after a kind of historical declaration in the preamble, that England was never subject to France, the body of the act is penned thus: "The King doth grant and establish;" which are words merely introductive *novæ legis*, as if the King gave a charter of franchise, and did invest, by a donative, the subjects of England with a new privilege or exemption, which by the common law they had not.

To come now to the book-cases which they put; which I will couple together, because they receive one joint answer.

The first is 42 E. III. fol. where the book saith, exception was taken that the plaintiff was born in Scotland at Ross, out of the allegiance of England.

The next is 22 H. VI. fol. 38. Adrian's case; where it is pleaded that a woman was born at Bruges, out of the allegiance of England.

The third is 13 Eliz. Dyer, fol. 300. where the case begins thus: *Doctor Story qui notorie dignoscitur esse subditus regni Angliæ.* In all these three, say they, that is pleaded, that the party is subject of the kingdom of England, and not of the King of England.

To these books I give this answer, that they be not the pleas at large, but the words of the reporter, who speaks compendiously and narratively, and not according to the solemn words of the pleading. If you find a case put, that it is pleaded a man was seised in fee-simple, you will not infer upon that, that the words of the pleading were *in feodo simplici*, but *sibi et hæredibus suis*. But shew me some precedent of a pleading at large, of *natus sub ligeantia regni Angliæ;* for whereas Mr. Walter said that pleadings are variable in this point, he would fain bring it to that; but there is no such matter; for the pleadings are constant and uniform in this point: they may vary in the word *fides*, or *ligeantia*, or *obedientia*, and some other circumstances; but in the form of *regni* and *regis* they vary not: neither can there, as I am persuaded, be any one instance shewed forth to the contrary. See 9 Eliz. 4. Baggot's Assize, fol. 7. where the pleading at large is entered in the book; there you have *alienigena natus extra ligeantiam domini regis Angliæ*. See the precedents in the book of entries, pl. 7. and two other places, for there be no more: and there you shall find still *sub ligeantia domini regis*, or *extra ligeantiam domini regis*. And therefore the forms of pleading, which are things so reverend, and are indeed towards the reasons of the law, as *palma*, and *pugnus*, containing the reason of the law, opened or unfolded, or displayed, they make all for us. And for the very words of reporters in books, you must acknowledge and say, *ilicet obruimur numero*. For you have 22 Ass. pl. 25. 27 Ass. the prior of Shells case, pl. 48. 14 H. IV. fol. 19. 3 H. VI. fol. 35. 6 H. VIII. in my lord Dyer, fol. 2. In all these books the very words of the reporters have "the allegiance of the King," and not, the allegiance of England. And the book in the 24 Edw. III. which is your best book, although while it is tossed at the bar, you have sometimes the words "allegiance of England," yet when it comes to Thorp, chief justice, to give the rule, he saith, "we will be certified by "the roll, whether Scotland be within the allegiance "of the King." Nay, that farther form of pleading beateth down your opinion: That it sufficeth not to

say that he is born out of the allegiance of the King, and stay there, but he must shew in the affirmative, under the allegiance of what King or state he was born. The reason whereof cannot be, because it may appear whether he be a friend or an enemy, for that in a real action is all one: nor it cannot be because issue shall be taken thereupon; for the issue must arise on the other side upon *indigena* pleaded and traversed. And therefore it can have no other reason, but to apprize the court more certainly, that the country of the birth is none of those that are subject to the King. As for the trial, that it should be impossible to be tried, I hold it not worth the answering; for the *Venire facias* shall go either where the natural birth is laid, although it be but by fiction, or if it be laid according to the truth, it shall be tried where the action is brought, otherwise you fall upon a main rock, that breaketh your argument in pieces; for how should the birth of an Irishman be tried, or of a Jerseyman? nay, how should the birth of a subject be tried, that is born of English parents in Spain or Florence, or any part of the world? For to all these the like objection of trial may be made, because they are within no counties: and this receives no answer. And therefore I will now pass on to the second main argument.

It is a rule of the civil law, say they, *Cum duo jura, etc.* when two rights do meet in one person, there is no confusion of them, but they remain still in the eye of law distinct, as if they were in several persons: and they bring examples of one man bishop of two sees, or one parson that is rector of two churches. They say this unity in the bishop or the rector doth not create any privity between the parishioners or dioceseners, more than if there were several bishops, or several parsons. This rule I allow, as was said, to be a rule not of the civil law only but of common reason, but receiveth no forced or coined but a true and sound distinction or limitation, which is, that it evermore faileth and deceiveth in cases where there is any vigour or operation of the natural person; for generally in corporations the natural body is but *suffulcimentum*

corporis corporati, it is but as a stock to uphold and bear out the corporate body; but otherwise it is in the case of the crown, as shall be manifestly proved in due place. But to shew that this rule receiveth this distinction, I will put but two cases; the statute of 21 H. VIII. ordaineth that a marquis may retain six chaplains qualified, a lord treasurer of England four, a privy-counsellor three. The lord treasurer Paulet was marquis of Winchester, lord treasurer of England, and privy-counsellor, all at once. The question was, whether he should qualify thirteen Chaplains? Now by the rule *Cum duo jura* he should; but adjudged, he should not. And the reason was, because the attendance of chaplains concerned and respected his natural person; he had but one soul, though he had three offices. The other case which I will put is the case of homage. A man doth homage to his lord for a tenancy held of the manor of Dale; there descendeth unto him afterwards a tenancy held of the manor of Sale, which manor of Sale is likewise in the hands of the same lord. Now by the rule *Cum duo jura,* he should do homage again, two tenancies and two seigniories, though but one tenant and one lord, *æquum est ac si esset in duobus:* but ruled that he should not do homage again: nay in the case of the King he shall not pay a second respect of homage, as upon grave and deliberate consideration it was resolved, 24 Hen. VIII. and *usus scaccarii,* as there is said, accordingly. And the reason is no other but because when a man is sworn to his lord, he cannot be sworn over again: he hath but one conscience, and the obligation of this oath trencheth between the natural person of the tenant and the natural person of the lord. And certainly the case of homage and tenure, and of homage liege, which is one case, are things of a near nature, save that the one is much inferior to the other; but it is good to behold these great matters of state in cases of lower element, as the eclipse of the sun is used to be in a pail of water.

The third main argument containeth certain supposed inconveniencies, which may ensue of a general

naturalization *ipso jure*, of which kind three have been specially remembered.

The first is the loss of profit to the King upon letters of denization and purchases of aliens.

The second is the concourse of Scotsmen into this kingdom, to the infeebling of that realm of Scotland in people, and the impoverishing of this realm of England in wealth.

The third is, that the reason of this case stayeth not within the compass of the present case; for although it were some reason that Scotsmen were naturalized, being people of the same island and language, yet the reason which we urge, which is, that they are subject to the same King, may be applied to persons every way more estranged from us than they are; as if in future time, in the King's descendents, there should be a match with Spain, and the dominions of Spain should be united with the crown of England, by one reason, say they, all the West Indies should be naturalized; which are people not only *alterius soli*, but *alterius cœli*.

To these conceits of inconvenience, how easy it is to give answer, and how weak they are in themselves, I think no man that doth attentively ponder them can doubt; for how small revenue can arise of such denizations, and how honourable were it for the King to take escheats of his subjects, as if they were foreigners, for seizure of aliens lands are in regard the King hath no hold or command of their persons and services, every one may perceive. And for the confluence of Scotsmen, I think, we all conceive the springtide is past at the King's first coming in. And yet we see very few families of them throughout the cities and boroughs of England. And for the naturalizing of the Indies, we can readily help that, when the case comes; for we can make an act of parliament of separation if we like not their consort. But these being reasons politic, and not legal, and we are not now in parliament, but before a judgment-seat, I will not meddle with them, especially since I have one answer which avoids and confounds all their objections in law;

which is, that the very self-same objections do hold in countries purchased by conquest. For in subjects obtained by conquest, it were more profit to indenizate by the poll; in subjects obtained by conquest, they may come in too fast. And if King Henry VII. had accepted the offer of Christopher Columbus, whereby the crown of England had obtained the Indies by conquest or occupation, all the Indies had been naturalized by the confession of the adverse part. And therefore since it is confessed, that subjects obtained by conquest are naturalized, and that all these objections are common and indifferent, as well to case of conquest as case of descent, these objections are in themselves destroyed.

And therefore, to proceed now to overthrow that distinction of descent and conquest. Plato saith well, the strongest of all authorities is, if a man can alledge the authority of his adversary against himself: we do urge the confession of the other side, that they confessed the Irish are naturalized; that they confess the subjects of the isles of Jersey and Guernsey, and Berwick, to be naturalized, and the subjects of Calais and Tournay, when they were English, were naturalized; as you may find in the 5 Eliz. in Dyer, upon the question put to the judges by Sir Nicholas Bacon, lord keeper.

To avoid this, they fly to a difference, which is new-coined, and is, (I speak not to the disadvantage of the persons that use it; for they are driven to it *tanquam ad ultimum refugium;* but the difference itself,) it is, I say, full of ignorance and error. And therefore, to take a view of the supports of this difference, they alledge four reasons.

The first is, that countries of conquest are made parcel of England, because they are acquired by the arms and treasure of England. To this I answer, that it were a very strange argument, that if I wax rich upon the manor of Dale, and upon the revenue thereof purchase a close by it, that it should make that parcel of the manor of Dale. But I will set this new learning on ground with a question or case put. For

I oppose them that hold this opinion with this question, If the King should conquer any foreign country by an army compounded of Englishmen and Scotsmen, as it is like, whensoever wars are, so it will be, I demand, Whether this country conquered shall be naturalized both in England and Scotland, because it was purchased by the joint arms of both? and if yea, Whether any man will think it reasonable, that such subjects be naturalized in both kingdoms; the one kingdom not being naturalized towards the other? These are the intricate consequences of conceits.

A second reason they alledge is, that countries won by conquest become subject to the laws of England, which countries patrimonial are not, and that the law doth draw the allegiance, and allegiance naturalization.

But to the major proposition of that argument, touching the dependency of allegiance upon law, somewhat hath been already spoken, and full answer shall be given when we come to it. But in this place it shall suffice to say, that the minor proposition is false; that is, that the laws of England are not superinduced upon any country by conquest; but that the old laws remain until the King by his proclamation or letters patent declare other laws; and then if he will he may declare laws which be utterly repugnant, and differing from the laws of England. And hereof many ancient precedents and records may be shewed, that the reason why Ireland is subject to the laws of England is not *ipso jure* upon conquest, but grew by a charter of King John; and that extended but to so much as was then in the King's possession; for there are records in the time of King E. I. and II. of divers particular grants to sundry subjects of Ireland and their heirs, that they might use and observe the laws of England.

The third reason is, that there is a politic necessity of intermixture of people in case of subjection by conquest, to remove alienations of mind, and to secure the state; which holdeth not in case of descent. Here I perceive Mr. Walter hath read somewhat in matter of state; and so have I likewise; though we may both quickly lose ourselves in causes of this nature.

I find by the best opinions, that there be two means to assure and retain in obedience countries conquered, both very differing, almost in extremes, the one towards the other.

The one is by colonies, and intermixture of people, and transplantation of families, which Mr. Walter spoke of; and it was indeed the Roman manner: but this is like an old relick, much reverenced and almost never used. But the other, which is the modern manner, and almost wholly in practice and use, is by garrisons and citadels, and lists or companies of men of war, and other like matters of terror and bridle.

To the first of these, which is little used, it is true that naturalization doth conduce, but to the latter it is utterly opposite, as putting too great pride and means to do hurt in those that are meant to be kept short and low. And yet in the very first case, of the Roman proceeding, naturalization did never follow by conquest, during all the growth of the Roman empire; but was ever conferred by charters, or donations, sometimes to cities and towns, sometimes to particular persons, and sometimes to nations, until the time of Adrian the emperor, and the law *In orbe Romano:* and that law or constitution is not referred to title of conquest and arms only, but to all other titles; as by the donation and testament of Kings, by submission and dedition of states, or the like: so as this difference was as strange to them as to us. And certainly I suppose it will sound strangely in the hearing of foreign nations, that the law of England should *ipso facto* naturalize subjects of conquests, and should not naturalize subjects which grow unto the King by descent; that is, that it should confer the benefit and privilege of naturalization upon such as cannot at the first but bear hatred and rancour to the state of England, and have had their hands in the blood of the subjects of England, and should deny the like benefit to those that are conjoined with them by a more amiable mean; and that the law of England should confer naturalization upon slaves and vassals, for people conquered are no better in the beginning, and should deny it to

freemen: I say, it will be marvelled at abroad, of what complexion the laws of England be made, that breedeth such differences. But there is little danger of such scandals; for this is a difference that the law of England never knew.

The fourth reason of this difference is, that in case of conquest the territory united can never be separated again. But in case of descent, there is a possibility; if his Majesty's line should fail, the kingdoms may sever again to their respective heirs; as in the case of 8 Hen. VI. where it is said, that if land descend to a man from the ancestor on the part of his father, and a rent issuing out of it from an ancestor on the part of the mother; if the party die without issue, the rent is revived. As to this reason, I know well the continuance of the King's line is no less dear to those that alledge the reason, than to us that confute it. So as I do not blame the passing of the reason: but it is answered with no great difficulty; for, first, the law doth never respect remote and foreign possibilities, as notably appeared in the great case between Sir Hugh Cholmley and Houlford in the exchequer, where one in the remainder, to the end to bridle tenant in tail from suffering a common recovery, granted his remainder to the King; and because he would be sure to have it out again without charge or trouble when his turn was served, he limited it to the King during the life of tenant in tail. Question grew, whether this grant of remainder were good, yea or no. And it was said to be frivolous and void, because it could never by any possibility execute; for tenant in tail cannot surrender; and if he died, the remainder likewise ceased. To which it was answered, that there was a possibility that it might execute, which was thus: Put case, that tenant in tail should enter into religion, having no issue; then the remainder should execute, and the King should hold the land during the natural life of tenant in tail, notwithstanding his civil death. But the court *una voce* exploded this reason, and said, that monasteries were down, and entries into religion gone, and they must be up again

ere this could be; and that the law did not respect such remote and foreign possibilities. And so we may hold this for the like: for I think we all hope, that neither of those days shall ever come, either for monasteries to be restored, or for the King's line to fail. But the true answer is, that the possibility subsequent, remote or not remote, doth not alter the operation of law for the present. For that should be, as if in case of the rent which you put, you should say, that in regard that the rent may be severed, it should be said to be *in esse* in the mean time, and should be grantable; which is clearly otherwise. And so in the principal case, if that should be, which God of his goodness forbid, *cessante causa cessat effectus*, the benefit of naturalization for the time to come is dissolved. But that altereth not the operation of the law; *rebus sic stantibus*. And therefore I conclude, that this difference is but a devise full of weakness and ignorance; and that there is one and the same reason of naturalizing subjects by descent, and subjects by conquest; and that is the union in the person of the King; and therefore that the case of Scotland is as clear as that of Ireland, and they that grant the one cannot deny the other. And so I conclude the second part, touching confutation.

To proceed therefore to the proofs of our part, your lordships cannot but know many of them must be already spent in the answer which we have made to the objections. For *corruptio unius, generatio alterius*, holds as well in arguments, as in nature, the destruction of an objection begets a proof. But nevertheless I will avoid all iteration, lest I should seem either to distract your memories, or to abuse your patience; but will hold myself only to these proofs which stand substantially of themselves, and are not intermixed with matter of confutation. I will therefore prove unto your lordships that the *post-natus* of Scotland is by the law of England natural, and ought so to be adjudged, by three courses of proof.

1. First, upon point of favour of law.
2. Secondly, upon reasons and authorities of law.

3. And lastly, upon former precedents and examples.

1. Favour of law: what mean I by that? The law is equal, and favoureth not. It is true, not persons; but things or matters it doth favour. Is it not a common principle, that the law favoureth three things, life, liberty, and dower? And what is the reason of this favour? This, because our law is grounded upon the law of nature. And these three things do flow from the law of nature, preservation of life natural; liberty, which every beast or bird seeketh and affecteth naturally; the society of man and wife, whereof dower is the reward natural. It is well, doth the law favour liberty so highly, as a man shall enfranchise his bondman when he thinketh not of it, by granting to him lands or goods; and is the reason of it *quia natura omnes homines erant liberi;* and that servitude or villenage doth cross and abridge the law of nature? And doth not the self-same reason hold in the present case? For, my lords, by the law of nature all men in the world are naturalized one towards another; they were all made of one lump of earth, of one breath of God; they had the same common parents: nay, at the first they were, as the Scripture sheweth, *unius labii*, of one language, until the curse; which curse, thanks be to God, our present case is exempted from. It was civil and national laws that brought in these words, and differences, of *civis* and *exterus*, alien and native. And therefore because they tend to abridge the law of nature, the law favoureth not them, but takes them strictly; even as our law hath an excellent rule, That customs of towns and boroughs shall be taken and construed strictly and precisely, because they do abridge and derogate from the law of the land. So by the same reason all national laws whatsoever are to be taken strictly and hardly in any point wherein they abridge, and derogate from the law of nature. Whereupon I conclude that your lordships cannot judge the law for the other side, except the case be *luce clarius*. And if it appear to you but doubtful, as I think no man in his right senses but will yield it to be at least doubtful, then ought your lordships, under your cor-

rection be it spoken, to pronounce for us because of the favour of the law. Furthermore as the law of England must favour naturalization as a branch of the law of nature, so it appears manifestly, that it doth favour it accordingly. For is it not much to make a subject naturalized? By the law of England, it should suffice, either place or parents, if he be born in England it is no matter though his parents be Spaniards, or what you will. On the other side, if he be born of English parents, it skilleth not though he be born in Spain, or in any other place of the world. In such sort doth the law of England open her lap to receive in people to be naturalized; which indeed sheweth the wisdom and excellent composition of our law, and that it is the law of a warlike and magnanimous nation fit for empire. For look, and you shall find that such kind of estates have been ever liberal in point of naturalization: whereas merchant-like and envious estates have been otherwise.

For the reasons of law joined with authorities, I do first observe to your lordships, that our assertion or affirmation is simple and plain: that it sufficeth to naturalization, that there be one King, and that the party be *natus ad fidem regis*, agreeable to the definition of Littleton, which is: Alien is he which is born out of the allegiance of our lord the King. They of the other side speak of respects, and *quoad*, and *quatenus*, and such subtilities and distinctions. To maintain therefore our assertion, I will use three kinds of proof.

The first is, that allegiance cannot be applied to the law or kingdom, but to the person of the King, because the allegiance of the subject is more large and spacious, and hath a greater latitude and comprehension than the law or the kingdom. And therefore it cannot be a dependency of that without the which it may of itself subsist.

The second proof which I will use is, that the natural body of the King hath an operation and influence into his body politic, as well as his body politic hath upon his body natural; and therefore that al-

though his body politic of King of England, and his body politic of King of Scotland, be several and distinct, yet nevertheless his natural person, which is one, hath an operation upon both, and createth a privity between them.

And the third proof is the binding text of five several statutes.

For the first of these, I shall make it manifest, that the allegiance is of a greater extent and dimension than laws or kingdom, and cannot consist by the laws merely; because it began before laws, it continueth after laws, and it is in vigour where laws are suspended and have not their force. That it is more ancient than law, appeareth by that which was spoken in the beginning by way of inducement, where I did endeavour to demonstrate, that the original age of kingdoms was governed by natural equity, that kings were more ancient than lawgivers, that the first submissions were simple, and upon confidence to the person of Kings, and that the allegiance of subjects to hereditary monarchies can no more be said to consist by laws, than the obedience of children to parents.

That allegiance continueth after laws, I will only put the case, which was remembered by two great judges in a great assembly, the one of them now with God: which was; That if a King of England should be expulsed his kingdom, and some particular subjects should follow him in flight or exile in foreign parts, and any of them there should conspire his death; that, upon his recovery of his kingdom, such a subject might by the law of England be proceeded with for treason committed and perpetrated at what time he had no kingdom, and in place where the law did not bind.

That allegiance is in vigour and force where the power of law hath a cessation, appeareth notably in time of wars, for *silent leges inter arma.* And yet the sovereignty and imperial power of the King is so far from being then extinguished or suspended, as contrariwise it is raised and made more absolute; for then he may proceed by his supreme authority, and martial law, without observing formalities of the laws

of his kingdom. And therefore whosoever speaketh of laws, and the King's power by laws, and the subjects obedience or allegiance to laws, speak but of one half of the crown. For Bracton, out of Justinian, doth truly define the crown to consist of laws and arms, power civil and martial, with the latter whereof the law doth not intermeddle: so as where it is much spoken, that the subjects of England are under one law, and the subjects of Scotland are under another law, it is true at Edinburgh or Sterling, or again in London or York; but if Englishmen and Scotsmen meet in an army royal before Calais, I hope, then they are under one law. So likewise not only in time of war, but in time of peregrination: If a King of England travel or pass through foreign territories, yet the allegiance of his subjects followeth him: as appeareth in that notable case which is reported in Fleta, where one of the train of King Edward I. as he passed through France from the Holy land, imbezzled some silver plate at Paris, and jurisdiction was demanded of this crime by the French King's counsel at law, *ratione soli*, and demanded likewise by the officers of King Edward, *ratione personæ;* and after much solemnity, contestation, and interpleading, it was ruled and determined for King Edward, and the party tried and judged before the knight marshal of the King's house, and hanged after the English law, and execution in St. Germains meadows. And so much for my first proof.

For my second main proof, that is drawn from the true and legal distinction of the King's several capacities; for they that maintain the contrary opinion do in effect destroy the whole force of the King's natural capacity, as if it were drowned and swallowed up by his politic. And therefore I will first prove to your lordships, that his two capacities are in no sort confounded. And secondly, that as his capacity politic worketh so upon his natural person, as it makes it differ from all other the natural persons of his subjects; so *e converso*, his natural body worketh so upon his politic, as the corporation of the crown utterly differeth from all other corporations within the realm.

For the first, I will vouch you the very words which I find in that notable case of the duchy, where the question was, whether the grants of King Edward VI. for duchy lands should be avoided in points of nonage? The case, as your lordships know well, is reported by Mr. Plowden as the general resolution of all the judges of England, and the King's learned counsel, Rouswell the solicitor only excepted; there I find the said words, Comment. fol. 215. "There is in the King not a "body natural alone, nor a body politic alone, but a "body natural and politic together: *corpus corpora-* "*tum in corpore naturali, et corpus naturale in cor-* "*pore corporato.*" The like I find in the great case of the lord Berkley set down by the same reporter, Comment. fol. 234. "Though there be in the King "two bodies, and that those two bodies are conjoined, "yet are they by no means confounded the one by "the other."

Now then to see the mutual and reciprocal intercourse, as I may term it, or influence or communication of qualities, that these bodies have the one upon the other: the body politic of the crown induceth the natural person of the King with these perfections: That the King in law shall never be said to be within age: that his blood shall never be corrupted: and that if he were attainted before, the very assumption of the crown purgeth it. That the King shall not take but by matter of record, although he take in his natural capacity as upon a gift in tail. That his body in law shall be said to be as it were immortal; for there is no death of the King in law, but a demise, as it is termed: with many other the like privileges and differences from other natural persons too long to rehearse, the rather because the question laboureth not in that part. But on the contrary part let us see what operations the King's natural person hath upon his crown and body politic: of which the chiefest and greatest is, that it causeth the crown to go by descent, which is a thing strange and contrary to the course of all corporations, which evermore take in succession, and not by descent; for no man can shew me in all the corporations of England, of what nature soever,

whether they consist of one person, or of many; or whether they be temporal or ecclesiastical, any one takes to him and his heirs, but all to him and his successors. And therefore here you may see what a weak course that is, to put cases of bishops and parsons, and the like, and to apply them to the crown. For the King takes to him and his heirs in the manner of a natural body, and the word, successors, is but superfluous: and where that is used, that is ever duly placed after the word, heirs, "the King, his heirs, and successors."

Again, no man can deny but *uxor et filius sunt nomina naturæ*. A corporation can have no wife, nor a corporation can have no son: how is it then that it is treason to compass the death of the Queen or of the Prince? There is no part of the body politic of the crown in either of them, but it is entirely in the King. So likewise we find in the case of the lord Berkley, the question was, whether the statute of 35 Henry VIII. for that part which concerned Queen Catharine Par's jointure, were a public act or no, of which the judges ought to take notice, not being pleaded; and judged a public act. So the like question came before your lordship, my lord Chancellor, in Serjeant Heale's case: whether the statute of 11 Edward III. concerning the entailing of the dukedom of Cornwall to the Prince, were a public act or no; and ruled likewise a public act. Why? no man can affirm but these be operations of law, proceeding from the dignity of the natural person of the King; for you shall never find that another corporation whatsoever of a bishop, or master of a college, or mayor of London, worketh any thing in law upon the wife or son of the bishop or the mayor. And to conclude this point, and withal to come near to the case in question, I will shew you where the natural person of the King hath not only an operation in the case of his wife and children, but likewise in the case of his subjects, which is the very question in hand. As for example, I put this case: Can a Scotsman, who is a subject to the natural person of the King, and not to the crown of England; can a Scotsman, I say, be an enemy by

the law to the subjects of England? Or must he not of necessity, if he should invade England, be a rebel and no enemy, not only as to the King, but as to the subject? Or can any letters of mart or reprisal be granted against a Scotsman that shall spoil an Englishman's goods at sea? And certainly this case doth press exceeding near the principal case; for it proveth plainly, that the natural person of the King hath such a communication of qualities with his body politic, as it makes the subjects of either kingdom stand in another degree of privity one towards the other, than they did before. And so much for the second proof.

For the five acts of parliament which I spoke of, which are concluding to this question.

The first of them is that concerning the banishment of Hugh Spencer in the time of King Edward II. in which act there is contained the charge and accusation whereupon his exile proceeded. One article of which charge is set down in these words: "Homage "and oath of the subject is more by reason of the "crown than by reason of the person of the King, "So that if the King doth not guide himself by rea-"son in right of the crown, his lieges are bound by "their oath to the crown to remove the King."

By which act doth plainly appear the perilous consequence of this distinction concerning the person of the King and the crown. And yet I do acknowledge justly and ingenuously a great difference between that assertion and this, which is now maintained: for it is one thing to make things distinct, another thing to make them separable, *aliud est distinctio, aliud separatio;* and therefore I assure myself, that those that now use and urge that distinction, do as firmly hold, that the subjection to the King's person and to the crown are inseparable, though distinct, as I do. And it is true that the poison of the opinion and assertion of Spencer is like the poison of a scorpion, more in the tail than in the body: for it is the inference that they make, which is, that the King may be deposed or removed, that is the treason and disloyalty of that opinion. But by your leave, the body is never a whit the more wholesome meat for having such a

tail belonging to it: therefore we see that is *locus lubricus*, an opinion from which a man may easily slide into an absurdity. But upon this act of parliament I will only note one circumstance more, and so leave it, which may add authority unto it in the opinion of the wisest; and that is, that these Spencers were not ancient nobles or great patriots that were charged and prosecuted by upstarts and favourites: for then it might be said, that it was but the action of some flatterers, who used to extol the power of monarchs to be infinite: but it was contrary; a prosecution of those persons being favourites by the nobility; so as the nobility themselves, which seldom do subscribe to the opinion of an infinite power of monarchs, yet even they could not endure, but their blood did rise to hear that opinion, that subjection is owing to the crown rather than to the person of the King.

The second act of parliament which determined this case, is the act of recognition in the first year of his Majesty, wherein you shall find, that in two several places, the one in the preamble, the other in the body of the act, the parliament doth recognise that these two realms of England and Scotland are under one imperial crown. The parliament doth not say under one monarchy or King, which might refer to the person, but under one imperial crown, which cannot be applied but to the sovereign power of regiment comprehending both kingdoms. And the third act of parliament is the act made in the fourth year of his Majesty's reign, for the abolition of hostile laws: wherein your lordships shall find likewise in two places, that the parliament doth acknowledge, that there is an union of these two kingdoms already begun in his Majesty's person: so as by the declaration of that act, they have not only one King, but there is an union in inception in the kingdoms themselves.

These two are judgments in parliament by way of declaration of law, against which no man can speak. And certainly these are righteous and true judgments to be relied upon; not only for the authority of them, but for the verity of them; for to any that shall well and deeply weigh the effects of law upon this con-

junction, it cannot but appear, that although *partes integrales* of the kingdom, as the philosophers speak, such as the laws, the officers, the parliament, are not yet commixed; yet nevertheless there is but one and the self-same fountain of sovereign power depending upon the ancient submission, whereof I spake in the beginning; and in that sense the crowns and the kingdoms are truly said to be united.

And the force of this truth is such, that a grave and learned gentleman, that defended the contrary opinion, did confess thus far: That in ancient times, when monarchies, as he said, were but heaps of people without any exact form of policy; that then naturalization and communication of privileges did follow the person of the monarch; but otherwise since states were reduced to a more exact form: so as thus far we did consent; but still I differ from him in this, that these more exact forms, wrought by time, and custom, and laws, are nevertheless still upon the first foundation, and do serve only to perfect and corroborate the force and bond of the first submission, and in no sort to disannul or destroy it.

And therefore with these two acts do I likewise couple the act of 14 Edward III. which hath been alledged of the other side. For by collating of that act with this former two, the truth of that we affirm will the more evidently appear, according unto the rule of reason: *opposita juxta se posita magis elucescunt*. That act of 14 is an act of separation. These two acts formerly recited are acts tending to union. This act is an act that maketh a new law; it is by the words of grant and establish. These two acts declare the common law as it is, being by words of recognition and confession.

And therefore upon the difference of these laws you may substantially ground this position: That the common law of England, upon the adjunction of any kingdom unto the King of England, doth make some degree of union in the crowns and kingdoms themselves; except by a special act of parliament they be dissevered.

Lastly, the fifth act of parliament which I promised, is the act made in the 42 of E. III. cap. 10. which is an express decision of the point in question. The words are, " Item, (upon the petition put into parliament by " the commons) that infants born beyond the seas in " the seigniories of Calais, and elsewhere within the " lands and seigniories that pertain to our sovereign " lord the King beyond the seas, be as able and inhe- " ritable of their heritage in England, as other infants " born within the realm of England, it is accorded that " the common law and the statute formerly made be " holden."

Upon this act I infer thus much; first, that such as the petition mentioneth were naturalized, the practice shews: then if so, it must be either by common law or statute, for so the words report: not by statute, for there is no other statute but 25 E. III. and that extends to the case of birth out of the King's obedience, where the parents are English; *ergo* it was by the common law, for that only remains. And so by the declaration of this statute at the common law, " all infants, born within the lands and seigniories " (for I give you the very words again) that pertain " to our sovereign lord the King, (it is not said, as are " the dominions of England) are as able and inherita- " ble of their heritage in England, as other infants " born within the realm of England." What can be more plain? And so I leave statutes and go to precedents; for though the one do bind more, yet the other sometimes doth satisfy more.

For precedents, in the producing and using of that kind of proof, of all others it behoveth them to be faithfully vouched; for the suppressing or keeping back of a circumstance, may change the case: and therefore I am determined to urge only such precedents, as are without all colour or scruple of exception or objection, even of those objections which I have, to my thinking, fully answered and confuted. This is now, by the providence of God, the fourth time that the line and Kings of England have had dominions and seigniories united unto them as patrimonies, and by descent of *blood*; four unions, I say, there have been inclusive

with this last. The first was of Normandy, in the person of William, commonly called the Conqueror. The second was of Gascoigne, and Guienne, and Anjou, in the person of King Henry II. in his person, I say, though by several titles. The third was of the crown of France, in the person of King Edward III. And the fourth of the kingdom of Scotland, in his Majesty. Of these I will set aside such as by any cavillation can be excepted unto. First I will set aside Normandy, because it will be said, that the difference of countries accruing by conquest, from countries annexed by descent, in matter of communication of privileges, holdeth both ways, as well of the part of the conquering kingdom, as the conquered; and therefore that although Normandy was not a conquest of England, yet England was a conquest of Normandy, and so a communication of privileges between them. Again, set aside France, for that it will be said that although the King had a title in blood and by descent, yet that title was executed and recovered by arms, so as it is a mixt title of conquest and descent, and therefore the precedent not so clear.

There remains then Gascoigne and Anjou, and that precedent likewise I will reduce and abridge to a time, to avoid all question. For it will be said of them also, that after they were lost and recovered *in ore gladii*, that the ancient title of blood was extinct; and that the King was in upon his new title by conquest; and Mr. Walter hath found a book-case in 13 H. VI. abridged by Mr. Fitz-Herbert, in title of *Protection, placito* 56, where a protection was cast, *quia profecturus in Gasconiam* with the earl of Huntingdon, and challenged because it was not a voyage royal; and the justices thereupon required the sight of the commission, which was brought before them, and purported power to pardon felonies and treason, power to coin money, and power to conquer them that resist: whereby Mr. Walter, finding the word *conquest*, collected that the King's title at that time was reputed to be by conquest; wherein I may not omit to give *obiter* that answer, which law and truth pro-

vide, namely, that when any King obtaineth by war a country whereunto he hath right by birth, that he is ever in upon his ancient right, not upon his purchase by conquest; and the reason is, that there is as well a judgment and recovery by war and arms, as by law and course of justice. For war is a tribunal-seat, wherein God giveth the judgment, and the trial is by battle, or duel, as in the case of trial of private right: and then it follows, that whosoever cometh in by eviction, comes in his *remitter;* so as there will be no difference in countries whereof the right cometh by descent, whether the possession be obtained peaceably or by war. But yet nevertheless, because I will utterly take away all manner of evasion and subterfuge, I will yet set apart that part of time, in and during the which the subjects of Gascoigne and Guienne might be thought to be subdued by a re-conquest. And therefore I will not meddle with the prior of Shelley's case, though it be an excellent case; because it was in the time of 27 E. III. neither will I meddle with any cases, records, or precedents, in the time of King H. V. or King H. VI. for the same reason; but will hold myself to a portion of time from the first uniting of these provinces in the time of King H. II. until the time of King John, at what time those provinces were lost; and from that time again unto the seventeenth year of the reign of King E. II. at what time the statute of *prærogativa regis* was made, which altered the law in the point in hand.

That both in these times the subjects of Gascoigne, and Guienne, and Anjou, were naturalized for inheritance in England, by the laws of England, I shall manifestly prove; and the proof proceeds, as to the former time, which is our case, in a very high degree *a minore ad majus*, and as we say, *a multo fortiori.* For if this privilege of naturalization remained unto them when the countries were lost, and became subjects in possession to another King, much more did they enjoy it as long as they continued under the King's subjection.

Therefore to open the state of this point. After these provinces were, through the perturbations of the

state in the unfortunate time of King John, lost and severed, the principal persons which did adhere unto the French, were attainted of treason, and their escheats here in England taken and seized. But the people, that could not resist the tempest when their heads and leaders were revolted, continued inheritable to their possessions in England; and reciprocally the people of England inherited and succeeded to their possessions in Gascoigne, and were both accounted *ad fidem utriusque regis*, until the statute of *prærogativa regis;* wherein the wisdom and justice of the law of England is highly to be commended. For of this law there are two grounds of reason, the one of equity, the other of policy; that of equity was, because the common people were in no fault, but, as the Scripture saith in a like case, *quid fecerunt oves istæ?* It was the cowardise and disloyalty of their governors that deserved punishment, but *what had these sheep done?* And therefore to have punished them, and deprived them of their lands and fortunes, had been unjust. That of policy was, because if the law had forthwith, upon the loss of the countries by an accident of time, pronounced the people for aliens, it had been a kind of accession of their right, and a disclaimer in them, and so a greater difficulty to recover them. And therefore we see the statute which altered the law in this point, was made in the time of a weak King, that, as it seemed, despaired ever to recover his right, and therefore thought better to have a little present profit by escheats, than the continuance of his claim, and the countenance of his right, by the admitting of them to enjoy their inheritance as they did before.

The state therefore of this point being thus opened, it resteth to prove our assertion; that they were naturalized; for the clearing whereof I shall need but to read the authorities, they be so direct and pregnant. The first is the very text of the statute of *prærogativa regis. Rex habebit escætas de terris Normannorum, cujuscunque feodi fuerint, salvo servitio, quod pertinet ad capitales dominos feodi illius: et hoc similiter intelligendum est, si aliqua hæreditas descendat alicui nato*

in partibus transmarinis, et cujus antecessores fuerunt ad fidem regis Franciæ, ut tempore regis Johannis, et non ad fidem regis Angliæ, sicut contigit de baronia Monumetæ, etc.

By which statute it appears plainly, that before the time of King John there was no colour of any escheat, because they were the King's subjects in possession, as Scotland now is; but only it determines the law from that time forward.

This statute, if it had in it any obscurity, it is taken away by two lights, the one placed before it; and the other placed after it; both authors of great credit, the one for ancient, the other for late times: the former is Bracton, in his cap. *De exceptionibus, lib.* 5. *fol.* 427. and his words are these: *Est etiam et alia exceptio quæ tenenti competit ex persona petentis, propter defectum nationis, quæ dilatoria est, et non perimit actionem, ut si quis alienigena qui fuerit ad fidem regis Franciæ, et actionem instituat versus aliquem, qui fuerit ad fidem regis Angliæ, tali non respondeatur, saltem donec terræ fuerint communes.*

By these words it appeareth, that after the loss of the provinces beyond the seas, the naturalization of the subjects of those provinces was in no sort extinguished, but only was in suspence during the time of war, and no longer; for he saith plainly, that the exception, which we call plea, to the person of an alien, was not peremptory, but only dilatory, that is to say, during the time of war, and until there were peace concluded, which he terms by these words, *donec terræ fuerint communes:* which, though the phrase seem somewhat obscure, is expounded by Bracton himself in his fourth book, fol. 297. to be of peace made and concluded, whereby the inhabitants of England and those provinces might enjoy the profits and fruits of their lands in either place *communiter*, that is, respectively, or as well the one as the other: so as it is clear they were no aliens in right, but only interrupted and debarred of suits in the King's courts in time of war.

The authority after the statute is that of Mr. Stamford, the best expositor of a statute that hath been in our law; a man of reverend judgment and excellent order in his writings; his words are in his exposition upon the branch of the statute which we read before. "By this branch it should appear, that at this time "men of Normandy, Gascoigne, Guienne, Anjou, and "Britain, were inheritable within this realm, as well "as Englishmen, because that they were sometimes "subjects to the Kings of England, and under their "dominion, until King John's time, as is aforesaid: "and yet after his time, those men, saving such whose "lands were taken away for treason, were still in-"heritable within this realm till the making of this "statute; and in the time of peace between the two "Kings of England and France, they were answera-"ble within this realm, if they had brought any action "for their lands and tenements."

So as by these three authorities, every one so plainly pursuing the other, we conclude that the subjects of Gascoigne, Guienne, Anjou, and the rest, from their first union by descent, until the making of the statute of *prærogativa regis*, were inheritable in England, and to be answered in the King's courts in all actions, except it were in time of war. Nay more, which is *de abundanti*, that when the provinces were lost, and disannexed, and that the King was but King *de jure* over them, and not *de facto;* yet nevertheless the privilege of naturalization continued.

There resteth yet one objection, rather plausible to a popular understanding than any ways forcible in law or learning, which is a difference taken between the kingdom of Scotland and these duchies, for that the one is a kingdom, and the other was not so; and therefore that those provinces being of an inferior nature, did acknowledge our laws and seals, and parliament, which the kingdom of Scotland doth not.

This difference was well given over by Mr. Walter; for it is plain that a kingdom and absolute dukedom, or any other sovereign estate, do differ *honore*, and not *po-*

testate: for divers duchies and countries that are now, were sometimes kingdoms: and divers kingdoms that are now, were sometimes duchies, or of other inferior stile: wherein we need not travel abroad, since we have in our own state so notorious an instance of the country of Ireland, whereof King H. VIII. of late time was the first that writ himself King, the former stile being Lord of Ireland, and no more; and yet Kings had the same authority before, that they have had since, and the same nation the same marks of a sovereign state, as their parliaments, their arms, their coins, as they now have: so as this is too superficial an allegation to labour upon.

And if any do conceive that Gascoigne and Guienne were governed by the laws of England: First, that cannot be in reason; for it is a true ground, That wheresoever any prince's title unto any country is by law, he can never change the laws, for that they create his title; and therefore no doubt those duchies retained their own laws; which if they did, then they could not be subject to the laws of England. And next, again, the fact or practice was otherwise, as appeareth by all consent of story and record: for those duchies continued governed by the civil law, their trials by witnesses, and not by jury, their lands testamentary, and the like.

Now for the colours that some have endeavoured to give, that they should have been subordinate to the government of England; they were partly weak, and partly such as make strongly against them: for as to that, that writs of *Habeas Corpus* under the great seal of England have gone to Gascoigne, it is no manner of proof; for that the King's writs, which are mandatory, and not writs of ordinary justice, may go to his subjects into any foreign parts whatsoever, and under what seal it pleaseth him to use. And as to that, that some acts of parliament have been cited, wherein the parliaments of England have taken upon them to order matters of Gascoigne; if those statutes be well looked into, nothing doth more plainly convince the

contrary, for they intermeddle with nothing but that that concerneth either the English subjects personally, or the territories of England locally, and never the subjects of Gascoigne; for look upon the statute of 27 E. III. cap. 5. there it is said, that there shall be no forestalling of wines. But by whom? Only by English merchants; not a word of the subjects of Gascoigne, and yet no doubt they might be offenders in the same kind.

So in the sixth chapter it is said, that all merchants Gascoignes may safely bring wines into what part it shall please them: here now are the persons of Gascoignes; but then the place whither? Into the realm of England. And in the seventh chapter, that erects the ports of Bourdeaux and Bayonne for the staple towns of wine; the statute ordains, "that if any," but who? "English merchant, or his servants, shall buy "or bargain other where, his body shall be arrested "by the steward of Gascoigne, or the constable of "Bourdeaux:" true, for the officers of England could not catch him in Gascoigne; but what shall become of him, shall he be proceeded with within Gascoigne? No, but he shall be sent over into England into the Tower of London.

And this doth notably disclose the reason of that custom which some have sought to wrest the other way: that custom, I say, whereof a form doth yet remain, that in every parliament the King doth appoint certain committees in the upper house to receive the petitions of Normandy, Guienne, and the rest; which, as by the former statute doth appear, could not be for the ordering of the governments there, but for the liberties and good usage of the subjects of those parts when they came hither, or *vice versa*, for the restraining of the abuses and misdemeanors of our subjects when they went thither.

Wherefore I am now at an end. For us to speak of the mischiefs, I hold it not fit for this place, lest we should seem to bend the laws to policy, and not to take them in their true and natural sense. It is enough

that every man knows, that it is true of these two kingdoms, which a good father said of the Churches of Christ: *si inseparabiles insuperabiles.* Some things I may have forgot, and some things, perhaps, I may forget willingly; for I will not press any opinion or declaration of late time which may prejudice the liberty of this debate; but *ex dictis, et ex non dictis,* upon the whole matter I pray judgment for the plaintiff.

A

PROPOSITION TO HIS MAJESTY

BY

SIR FRANCIS BACON, KNIGHT,

HIS MAJESTY'S ATTORNEY GENERAL, AND ONE OF HIS PRIVY COUNCIL;

TOUCHING THE

COMPILING AND AMENDMENT OF THE LAWS OF ENGLAND.

YOUR Majesty, of your favour, having made me Privy-Counsellor, and continuing me in the place of your Attorney-General, which is more than was these hundred years before, I do not understand it to be, that by putting off the dealing in causes between party and party, I should keep holy-day the more; but that I should dedicate my time to your service with less distraction. Wherefore, in this plentiful accession of time, which I have now gained, I take it to be my duty, not only to speed your commandments and the business of my place; but to meditate and to excogitate of myself, wherein I may best, by my travels, derive your virtues to the good of your people, and return their thanks and increase of love to you again. And after I had thought of many things, I could find, in my judgment, none more proper for your Majesty as a master, nor for me as a workman, than the reducing and recompiling of the laws of England.

Your Majesty is a King blessed with posterity; and these Kings sort best with acts of perpetuity, when they do not leave them, instead of children; but transmit both line and merit to future generations. You are a great master in justice and judicature, and it were pity that the fruit of that virtue should die with you. Your Majesty also reigneth in learned times;

the more, in regard of your own perfections and patronage of learning; and it hath been the mishap of works of this nature, that the less learned time hath wrought upon the more learned, which now will not be so. As for myself, the law is my profession, to which I am a debtor. Some little helps I may have of other learning, which may give form to matter; and your Majesty hath set me in an eminent place, whereby in a work, which must be the work of many, I may the better have coadjutors. Therefore, not to hold your Majesty with any long preface, in that which I conceive to be nothing less than words, I will proceed to the matter: which matter itself nevertheless requireth somewhat briefly to be said, both of the dignity, and likewise of the safety, and convenience of this work: and then to go to the main: that is to say, to shew how the work is to be done: which incidently also will best demonstrate, that it is no vast nor speculative thing, but real and feasible. Callisthenes, that followed Alexander's court, and was grown in some displeasure with him, because he could not well brook the Persian adoration; at a supper, which with the Grecians was ever a great part talk, was desired, because he was an eloquent man, to speak of some theme; which he did, and chose for his theme the praise of the Macedonian nation; which though it were but a filling thing to praise men to their faces, yet he did it with such advantage of truth, and avoidance of flattery, and with such life, as the hearers were so ravished with it that they plucked the roses off from their garlands, and threw them upon him; as the manner of applauses then was. Alexander was not pleased with it, and by way of discountenance said, It was easy to be a good orator in a pleasing theme: "But," saith he to Callisthenes, "turn your "stile, and tell us now of our faults, that we may "have the profit, and not you only the praise;" which he presently did with such a force, and so piquantly, that Alexander said, The goodness of his theme had made him eloquent before; but now it was the malice of his heart, that had inspired him.

1. Sir, I shall not fall into either of those two extremes, concerning the laws of England; they commend themselves best to them that understand them; and your Majesty's chief justice of your bench hath in his writings magnified them not without cause: certainly they are wise, they are just and moderate laws; they give to God, they give to Cæsar, they give to the subjects, that which appertaineth. It is true, they are as mixt as our language, compounded of British, Roman, Saxon, Danish, Norman customs. And as our language is so much the richer, so the laws are the more complete: neither doth this attribute less to them, than those that would have them to have stood out the same in all mutations; for no tree is so good first set, as by transplanting.

2. As for the second extreme, I have nothing to do with it by way of taxing the laws. I speak only by way of perfecting them, which is easiest in the best things: for that which is far amiss hardly receiveth amendment; but that which hath already, to that more may be given. Besides, what I shall propound is not to the matter of the laws, but to the manner of their registry, expression, and tradition: so that it giveth them rather light than any new nature. This being so, for the dignity of the work I know scarcely where to find the like: for surely that scale, and those degrees of sovereign honour, are true and rightly marshalled; First the founders of states; then the lawgivers; then the deliverers and saviours after long calamities; then the fathers of their countries, which are just and prudent princes; and lastly, conquerors, which honour is not to be received amongst the rest, except it be where there is an addition of more country and territory to a better government than that was of the conquered. Of these, in my judgment, your Majesty may with more truth and flattery be intitled to the first, because of your uniting of Britain and planting Ireland; both which savour of the founder. That which I now propound to you, may adopt you also into the second: lawgivers have been called *principes perpetui;* because as bishop Gardiner said in a

bad sense, that he would be bishop an hundred years after his death, in respect of the long leases he made: so lawgivers are still Kings and Rulers after their decease, in their laws. But this work, shining so in itself, needs no taper. For the safety and convenience thereof, it is good to consider, and to answer those objections or scruples which may arise or be made against this work.

Obj. I. That it is a thing needless; and that the law, as it now is, is in good estate comparable to any foreign law: and that it is not possible for the wit of man, in respect of the frailty thereof, to provide against the incertainties and evasions, or omissions of law.

Resp. For the comparison with foreign laws, it is in vain to speak of it; for men will never agree about it. Our lawyers will maintain for our municipal laws; civilians, scholars, travellers, will be of the other opinion.

But certain it is, that our laws, as they now stand, are subject to great uncertainties, and variety of opinion, delays, and evasions: whereof ensueth,

1. That the multiplicity and length of suits is great.

2. That the contentious person is armed, and the honest subject wearied and oppressed.

3. That the judge is more absolute; who, in doubtful cases, hath a greater stroke and liberty.

4. That the chancery courts are more filled, the remedy of law being often obscure and doubtful.

5. That the ignorant lawyer shroudeth his ignorance of law, in that doubts are so frequent and many.

6. That mens assurances of their lands and estates by patents, deeds, wills, are often subject to question, and hollow; and many the like inconveniencies.

It is a good rule and direction, for that all laws, *secundum majus et minus*, do participate of uncertainties, that followeth: Mark, whether the doubts that arise, are only in cases not of ordinary experience; or which happen every day. If in the first only, impute it to the frailty of man's foresight, that cannot reach by law to all cases; but, if in the latter, be assured there is a fault in the law. Of this I say

no more, but that, to give every man his due, had it not been for Sir Edward Coke's *Reports*, (which though they may have errors, and some peremptory and extrajudicial resolutions more than are warranted; yet they contain infinite good decisions, and rulings over of cases,) the law, by this time, had been almost like a ship without ballast; for that the cases of modern experience are fled from those that are adjudged and ruled in former time.

But the necessity of this work is yet greater in the statute law. For first, there are a number of ensnaring penal laws, which lie upon the subject; and if in bad times they should be awaked and put in execution, would grind them to powder.

There is a learned civilian that expoundeth the curse of the prophet, *Pluet super eos laqueos*, of a multitude of penal laws, which are worse than showers of hail or tempest upon cattle, for they fall upon men.

There are some penal laws fit to be retained, but their penalty too great; and it is ever a rule, That any over-great penalty, besides the acerbity of it, deadens the execution of the law.

There is a further inconvenience of penal laws, obsolete, and out of use; for that it brings a gangrene, neglect, and habit of disobedience upon other wholesome laws, that are fit to be continued in practice and execution; so that our laws endure the torment of Mezentius:

The living die in the arms of the dead.

Lastly, There is such an accumulation of statutes concerning one matter, and they so cross and intricate, as the certainty of law is lost in the heap; as your Majesty had experience last day upon the point, Whether the incendiary of Newmarket should have the benefit of his clergy.

Obj. II. That it is a great innovation; and innovations are dangerous beyond foresight.

Resp. All purgings and medicines, either in the civil or natural body, are innovations: so as that argument is a common place against all noble reformations.

But the truth is, that this work ought not to be termed or held for any innovation in the suspected sense. For those are the innovations which are quarreled and spoken against, that concern the consciences, estates, and fortunes of particular persons: but this of general ordinance pricketh not particulars, but passeth *sine strepitu*. Besides, it is on the favourable part; for it easeth, it presseth not: and lastly, it is rather matter of order and explanation than of alteration. Neither is this without precedent in former governments.

The Romans, by their Decemvirs, did make their twelve tables; but that was indeed a new enacting or constituting of laws, not a registring or recompiling; and they were made out of the laws of the Grecians, not out of their own customs.

In Athens they had *Sexviri*, which were standing commissioners to watch and to discern what laws waxed improper for the time; and what new law did, in any branch, cross a former law, and so *ex officio*, propounded their repeals.

King Lewis XI. of France, had it in his intention to have made one perfect and uniform law, out of the civil law Roman, and the provisional customs of France.

Justinian the Emperor, by commissions directed to divers persons learned in the laws, reduced the Roman laws from vastness of volume, and a labyrinth of uncertainties, unto that course of the civil law which is now in use. I find here at home of late years, that King Henry VIII. in the twenty-seventh of his reign was authorised by parliament to nominate thirty-two commissioners, part ecclesiastical, part temporal, to purge the canon law, and to make it agreeable to the law of God, and the law of the realm; and the same was revived in the fourth year of Edward VI. though neither took effect.

For the laws of Lycurgus, Solon, Minos, and others of ancient time, they are not the worse, because grammar scholars speak of them: but things too ancient wax children with us again.

Edgar, the Saxon King, collected the laws of this

kingdom, and gave them the strength of a faggot bound, which formerly were dispersed.

The statutes of King Edward the first were fundamental. But, I doubt, I err in producing so many examples: for, as Cicero saith to Cæsar, so may I say to your Majesty; *Nil vulgare te dignum videri possit.*

Obj. III. In this purging of the course of the common laws and statutes, much good may be taken away.

Resp. In all purging, some good humours may pass away; but that is largely recompensed by lightening the body of much bad.

Obj. IV. Labour were better bestowed, in bringing the common laws of England to a text law, as the statutes are, and setting both of them down in method and by titles.

Resp. It is too long a business to debate, whether *lex scripta, aut non scripta,* a text law, or customs well registred, with received and approved grounds and maxims, and acts and resolutions judicial, from time to time duly entered and reported, be the better form of declaring and authorising laws. It was the principal reason or oracle of Lycurgus, that none of his laws should be written. Customs are laws written in living tables, and some traditions the Church doth not disauthorise. In all sciences they are the soundest, that keep close to particulars; and, sure I am, there are more doubts that rise upon our statutes, which are a text law, than upon the common law, which is no text law. But, howsoever that question be determined, I dare not advise to cast the law into a new mold. The work, which I propound, tendeth to pruning and grafting the law, and not to plowing up and planting it again; for such a remove I should hold indeed for a perilous innovation.

Obj. V. It will turn the judges, counsellors of law, and students of law to school again, and make them to seek what they shall hold and advise for law; and it will impose a new charge upon all lawyers to furnish themselves with new books of law.

Resp. For the former of these, touching the new

labour, it is true it would follow, if the law were new molded into a text law; for then men must be new to begin, and that is one of the reasons for which I disallow that course.

But in the way that I shall now propound, the entire body and substance of law shall remain, only discharged of idle and unprofitable or hurtful matter; and illustrated by order and other helps, towards the better understanding of it and judgment thereupon.

For the latter, touching the new charge, it is not worthy the speaking of in a matter of so high importance; it might have been used of the new translation of the Bible, and such like works. Books must follow sciences, and not sciences books.

The work itself; and the way to reduce and recompile the Laws of England.

THIS work is to be done, to use some few words, which is the language of action and effect, in this manner.

It consisteth of two parts; the digest or recompiling of the common laws, and that of the statutes.

In the first of these, three things are to be done:

1. The compiling of a book *De antiquitatibus juris.*

2. The reducing or perfecting of the course or corps of the common laws.

3. The composing of certain introductive and auxiliary books touching the study of the laws.

For the first of these, all ancient records in your Tower, or elsewhere, containing acts of parliament, letters patents, commissions, and judgments, and the like, are to be searched, perused, and weighed: and out of these are to be selected those that are of most worth and weight, and in order of time, not of titles, for the more conformity with the year-books, to be set down and registred, rarely in *hæc verba*; but summed with judgment, not omitting any material part; these are to be used for reverend precedents, but not for binding authorities.

For the second, which is the main, there is to be made a perfect course of the law *in serie temporis*, or year-books, as we call them, from Edward the First to this day: in the compiling of this course of law, or year-books, the points following are to be observed.

First, All cases which are at this day clearly no law, but constantly ruled to the contrary, are to be left out; they do but fill the volumes, and season the wits of students in a contrary sense of law. And so likewise all cases, wherein that is solemnly and long debated, whereof there is now no question at all, are to be entered as judgments only, and resolutions, but without the arguments, which are now become but frivolous: yet for the observation of the deeper sort of lawyers, that they may see how the law hath altered, out of which they may pick sometimes good use, I do advise, that upon the first in time of those obsolete cases there was a *memorandum* set, that at that time the law was thus taken, until such a time, *etc.*

Secondly, *Homonymiæ*, as Justinian calleth them, that is, cases merely of iteration and repetition, are to be purged away: and the cases of identity, which are best reported and argued, to be retained instead of the rest; the judgments nevertheless to be set down, every one in time as they are, but with a quotation or reference to the case where the point is argued at large: but if the case consist part of repetition, part of new matter, the repetition is only to be omitted.

Thirdly, As to the *Antinomiæ*, cases judged to the contrary, it were too great a trust to refer to the judgment of the composers of this work, to decide the law either way, except there be a current stream of judgments of later times; and then I reckon the contrary cases amongst cases obsolete, of which I have spoken before: nevertheless this diligence would be used, that such cases of contradiction be specially noted and collected, to the end those doubts, that have been so long militant, may either, by assembling all the judges in the exchequer chamber, or by parliament, be put into certainty. For to do it, by bringing them in question under feigned parties, is to be disliked. *Nihil habeat forum ex scena.*

Fourthly, All idle queries, which are but seminaries of doubts, and uncertainties, are to be left out and omitted, and no queries set down, but of great doubts well debated, and left undecided for difficulty; but

no doubting or upstarting queries, which though they be touched in argument for explanation, yet were better to die than to be put into the books.

Lastly, Cases reported with too great prolixity would be drawn into a more compendious report; not in the nature of an abridgment, but tautologies and impertinences to be cut off: as for misprinting, and insensible reporting, which many times confound the students, that will be *obiter* amended; but more principally, if there be any thing in the report which is not well warranted by the record, that is also to be rectified: the course being thus compiled, then it resteth but for your Majesty to appoint some grave and sound lawyers, with some honourable stipend, to be * reporters for the time to come, and then this is settled for all times.

For the auxiliary books that conduce to the study and science of the law, they are three: Institutions; a treatise *De regulis juris;* and a better book *De verborum significationibus*, or terms of the law. For the Institutions, I know well there be books of introductions, wherewith students begin, of good worth, especially Littleton and Fitzherbert's *Natura brevium;* but they are no ways of the nature of an institution; the office whereof is to be a key and general preparation to the reading of the course. And principally it ought to have two properties; the one a perspicuous and clear order or method; and the other, an universal latitude or comprehension, that the students may have a little prenotion of every thing, like a model towards a great building. For the treatise *De regulis juris*, I hold it, of all other things, the most important to the health, as I may term it, and good institutions of any laws: it is indeed like the ballast of a ship, to keep all upright and stable; but I have seen little in this kind, either in our law or other laws, that satisfieth

* This constitution of Reporters I obtained of the King, after I was Chancellor; and there are two appointed with 100l. a year a-piece stipend.

me. The naked rule or maxim doth not the effect: It must be made useful by good differences, ampliations, and limitations, warranted by good authorities; and this not by raising up of quotations and references, but by discourse and deducement in a just tractate. In this I have travelled myself, at the first more cursorily *, since with more diligence, and will go on with it, if God and your Majesty will give me leave. And I do assure your Majesty, I am in good hope, that when Sir Edward Coke's Reports, and my rules and decisions shall come to posterity, there will be, whatsoever is now thought, question, who was the greater lawyer? For the books Of the terms of the law, there is a poor one, but I wish a diligent one, wherein should be comprised not only the exposition of the terms of law, but of the words of all ancient records and precedents.

* See above, p. 16—81.

For the Abridgments, I could wish, if it were possible, that none might use them, but such as had read the course first, that they might serve for repertories to learned lawyers, and not to make a lawyer in haste: but since that cannot be, I wish there were a good abridgment composed of the two that are extant, and in better order. So much for the common law.

Statute Law.

For the reforming and recompiling of the statute law, it consisteth of four parts.

1. The first, to discharge the books of those statutes, where the case, by alteration of time, is vanished; as Lombards Jews, Gauls half-pence, *etc.* Those may nevertheless remain in the libraries for antiquities, but no reprinting of them. The like of statutes long since expired and clearly repealed; for if the repeal be doubtful, it must be so propounded to the parliament.

2. The next is, to repeal all statutes which are sleeping and not of use, but yet snaring and in force: in some of those it will perhaps be requisite to substitute some more reasonable law, instead of them, agreeable to the time; in others a simple repeal may suffice.

3. The third, that the grievousness of the penalty in many statutes be mitigated, though the ordinance stand.

4. The last is, the reducing of concurrent statutes, heaped one upon another, to one clear and uniform law. Towards this there hath been already, upon my motion, and your Majesty's direction, a great deal of good pains taken; my Lord Hobart, myself, Serjeant Finch, Mr. Heneage Finch, Mr. Noye, Mr. Hackwell, and others, whose labours being of a great bulk, it is not fit now to trouble your Majesty with any further particularity therein; only by this you may perceive the work is already advanced: but because this part of the work, which concerneth the statute laws, must of necessity come to parliament, and the houses will best like that which themselves guide, and the persons that themselves employ, the way were to imitate the precedent of the commissioners for the canon laws in 27 Hen. VIII. and 4 Edw. VI. and the commissioners for the union of the two realms, *primo* of your Majesty, and so to have the commissioners named by both houses; but not with a precedent power to conclude, but only to prepare and propound to parliament.

This is the best way, I conceive, to accomplish this excellent work, of honour to your Majesty's times, and of good to all times; which I submit to your Majesty's better judgment.

AN OFFER TO KING JAMES

OF

A DIGEST

TO BE MADE OF THE

LAWS OF ENGLAND.

Most Excellent Sovereign,

AMONGST the degrees and acts of sovereign, or rather heroical honour, the first or second is the person and merit of a lawgiver. Princes that govern well are fathers of the people: but if a father breed his son well, or allow him well while he liveth, but leave him nothing at his death, whereby both he and his children, and his childrens children, may be the better, surely the care and piety of a father is not in him complete. So Kings, if they make a portion of an age happy by their good government, yet if they do not make testaments, as God Almighty doth, whereby a perpetuity of good may descend to their country, they are but mortal and transitory benefactors. Domitian, a few days before he died, dreamed that a golden head did rise upon the nape of his neck: which was truly performed in the golden age that followed his times for five successions. But Kings, by giving their subjects good laws, may, if they will, in their own time, join and graft this golden head upon their own necks after their death. Nay, they may make Nabuchodonozor's image of monarchy golden from head to foot. And if any of the meaner sort of politics, that are sighted only to see the worst of things, think, that laws are but cobwebs, and that good Princes will do well without them, and bad will not stand much upon them; the discourse is neither good nor wise. For certain it is, that good laws are some bridle to bad princes, and

as a very wall about government. And if tyrants sometimes make a breach into them, yet they mollify even tyranny itself, as Solon's laws did the tyranny of Pisistratus: and then commonly they get up again, upon the first advantage of better times. Other means to perpetuate the memory and merits of sovereign Princes are inferior to this. Buildings of temples, tombs, palaces, theatres, and the like, are honourable things, and look big upon posterity: but Constantine the Great gave the name well to those works, when he used to call Trajan, that was a great builder, Parietaria, wall-flower, because his name was upon so many walls: so if that be the matter, that a King would turn wall-flower, or pellitory of the wall, with cost he may. Adrian's vein was better, for his mind was to wrestle a fall with time; and being a great progressor through all the Roman empire, whenever he found any decays of bridges, or highways, or cuts of rivers and sewers, or walls, or banks, or the like, he gave substantial order for their repair with the better. He gave also multitudes of charters and liberties for the comfort of corporations and companies in decay: so that his bounty did strive with the ruins of time. But yet this, though it were an excellent disposition, went but in effect to the cases and shells of a commonwealth. It was nothing to virtue or vice. A bad man might indifferently take the benefit and ease of his ways and bridges, as well as a good; and bad people might purchase good charters. Surely the better works of perpetuity in Princes are those, that wash the inside of the cup; such as are foundations of colleges and lectures for learning and education of youth; likewise foundations and institutions of orders and fraternities, for nobleness, enterprise, and obedience, and the like. But yet these also are but like plantations of orchards and gardens, in plots and spots of ground here and there; they do not till over the whole kingdom, and make it fruitful, as doth the establishing of good laws and ordinances; which makes a whole nation to be as a well-ordered college or foundation.

This kind of work, in the memory of times, is rare

enough to shew it excellent: and yet not so rare, as to make it suspected for impossible, inconvenient, or unsafe. Moses, that gave laws to the Hebrews, because he was the scribe of God himself, is fitter to be named for honour's sake to other lawgivers, than to be numbered or ranked amongst them. Minos, Lycurgus, and Solon, are examples for themes of grammar scholars. For ancient personages and characters now-a-days use to wax children again; though that parable of Pindarus be true, the best thing is water: for common and trivial things are many times the best, and rather despised upon pride, because they are vulgar, than upon cause or use. Certain it is, that the laws of those three lawgivers had great prerogatives. The first of fame, because they were the pattern amongst the Grecians: the second of lasting, for they continued longest without alteration: the third, of a spirit of reviver, to be often oppressed, and often restored.

Amongst the seven Kings of Rome four were lawgivers: for it is most true, that a discourser of Italy saith; "there was never state so well swaddled in the "infancy, as the Roman was by the virtue of their first "Kings; which was a principal cause of the wonder-"ful growth of that state in after-times."

The Decemvirs laws were laws upon laws, not the original; for they grafted laws of Græcia upon the Roman stock of laws and customs: but such was their success, as the twelve tables which they compiled were the main body of the laws which framed and wielded the great body of that estate. These lasted a long time, with some supplementals and the Pretorian edicts *in albo;* which were, in respect of laws, as writing tables in respect of brass; the one to be put in and out, as the other is permanent. Lucius Cornelius Sylla reformed the laws of Rome: for that man had three singularities, which never tyrant had but he; that he was a lawgiver, that he took part with the nobility, and that he turned private man, not upon fear, but upon confidence.

Cæsar long after desired to imitate him only in the

first, for otherwise he relied upon new men; and for resigning his power Seneca describeth him right; *Cæsar gladium cito condidit, nunquam posuit*, Cæsar soon sheathed his sword, but never put it off. And himself took it upon him, saying in scorn of Sylla's resignation; *Sylla nescivit literas, dictare non potuit*, "Sylla knew no letters, he could not dictate." But for the part of a lawgiver, Cicero giveth him the attribute; *Cæsar, si ab eo quæreretur, quid egisset in toga; leges se respondisset multas et præclaras tulisse;* "If "you had asked Cæsar what he did in the gown, he "would have answered, that he made many excellent "laws." His nephew Augustus did tread the same steps, but with deeper print, because of his long reign in peace; whereof one of the poets of his time saith,

Pace data terris, animum ad civilia vertit
Jura suum; legesque tulit justissimus auctor.

From that time there was such a race of wit and authority, between the commentaries and decisions of the lawyers, and the edicts of the emperors, as both law and lawyers were out of breath. Whereupon Justinian in the end recompiled both, and made a body of laws such as might be wielded, which himself calleth gloriously, and yet not above truth, the edifice or structure of a sacred temple of justice, built indeed out of the former ruins of books, as materials, and some novel constitutions of his own.

In Athens they had *Sexviri*, as Æschines observeth, which were standing commissioners, who did watch to discern what laws waxed improper for the times, and what new law did in any branch cross a former law, and so *ex officio* propounded their repeal.

King Edgar collected the laws of this kingdom, and gave them the strength of a faggot bound, which formerly were dispersed; which was more glory to him, than his sailing about this island with a potent fleet: for that was, as the Scripture saith, *via navis in mari*, "the way of a ship in the sea;" it vanished, but this lasteth. Alphonso the wise, the ninth of that name, King of Castile, compiled the digest of the laws of

Spain, intitled the *Siete Partidas;* an excellent work, which he finished in seven years. And as Tacitus noteth well, that the capitol, though built in the beginnings of Rome, yet was fit for the great monarchy that came after; so that building of laws sufficeth the greatness of the empire of Spain, which since hath ensued.

Lewis XI. had it in his mind, though he performed it not, to have made one constant law of France, extracted out of the civil Roman law, and the customs of provinces which are various, and the King's edicts, which with the French are statutes. Surely he might have done well, if, like as he brought the crown, as he said himself, from Page, so he had brought his people from Lackey; not to run up and down for their laws to the civil law, and the ordinances and the customs and the discretions of courts, and discourses of philosophers, as they use to do.

King Henry VIII. in the twenty-seventh year of his reign, was authorized by parliament to nominate thirty-two commissioners, part ecclesiastical, and part temporal, to purge the canon law, and to make it agreeable to the law of God, and the law of the land; but it took not effect: for the acts of that King were commonly rather proffers and fames, than either well-grounded, or well pursued: but, I doubt, I err in producing so many examples. For as Cicero said to Cæsar, so I may say to your Majesty, *Nil vulgare te dignum videri possit.* Though indeed this well understood is far from vulgar: for that the laws of the most kingdoms and states have been like buildings of many pieces, and patched up from time to time according to occasions, without frame or model.

Now for the laws of England, if I shall speak my opinion of them without partiality either to my profession or country, for the matter and nature of them, I hold them wise, just, and moderate laws: they give to God, they give to Cæsar, they give to the subject, what appertaineth. It is true they are as mixt as our language, compounded of British, Roman, Saxon, Danish, Norman customs: and surely as our language

is thereby so much the richer, so our laws are likewise by that mixture the more complete.

Neither doth this attribute less to them, than those that would have them to have stood out the same in all mutations. For no tree is so good first set, as by transplanting and grafting. I remember what happened to Callisthenes, that followed Alexander's court, and was grown into some displeasure with him, because he could not well brook the Persian adoration. At a supper, which with the Grecians was a great part talk, he was desired, the King being present, because he was an eloquent man, to speak of some theme, which he did; and chose for his theme, the praise of the Macedonian nation, which though it were but a filling thing to praise men to their faces, yet he performed it with such advantage of truth, and avoidance of flattery, and with such life, as was much applauded by the hearers. The King was the less pleased with it, not loving the man, and by way of discountenance said: It was easy to be a good orator in a pleasing theme. "But," saith he to him, "turn "your stile, and tell us now of our faults, that we may "have the profit, and not you the praise only;" which he presently did with such quickness, that Alexander said, That malice made him eloquent then, as the theme had done before. I shall not fall into either of these extremes, in this subject of the laws of England; I have commended them before for the matter, but surely they ask much amendment for the form; which to reduce and perfect, I hold to be one of the greatest dowries that can be conferred upon this kingdom: which work, for the excellency, as it is worthy your Majesty's act and times, so it hath some circumstance of propriety agreeable to your person. God hath blessed your Majesty with posterity, and I am not of opinion that Kings that are barren are fittest to supply perpetuity of generations by perpetuity of noble acts; but contrariwise, that they that leave posterity are the more interested in the care of future times; that as well their progeny, as their people, may participate of their merit.

Your Majesty is a great master in justice and judicature, and it were pity the fruit of that your virtue should not be transmitted to the ages to come. Your Majesty also reigneth in learned times, the more, no doubt, in regard of your own perfection in learning, and your patronage thereof. And it hath been the mishap of works of this nature, that the less learned time hath, sometimes, wrought upon the more learned, which now will not be so. As for myself, the law was my profession, to which I am a debtor: some little helps I have of other arts, which may give form to matter: and I have now, by God's merciful chastisement, and by his special providence, time and leisure to put my talent, or half talent, or what it is, to such exchanges as may perhaps exceed the interest of an active life. Therefore, as in the beginning of my troubles I made offer to your Majesty to take pains in the story of England, and in compiling a method and digest of your laws, so have I performed the first, which rested but upon myself, in some part: and I do in all humbleness renew the offer of this latter, which will require help and assistance, to your Majesty, if it shall stand with your good pleasure to employ my service therein.

THE

JUDICIAL CHARGE

OF

SIR FRANCIS BACON, KNIGHT,

THE KING'S SOLICITOR,

Upon the Commission of Oyer and Terminer held for the

VERGE OF THE COURT.

Lex vitiorum emendatrix, virtutum commendatrix est.

YOU are to know, and consider well the duty and service to which you are called, and whereupon you are by your oath charged. It is the happy estate and condition of the subject of this realm of England, that he is not to be impeached in his life, lands, or goods, by flying rumours, or wandering fames and reports, or secret and privy inquisitions; but by the oath and presentment of men of honest condition, in the face of justice. But this happy estate of the subject will turn to hurt and inconvenience, if those that hold that part which you are now to perform shall be negligent and remiss in doing their duty; for as of two evils it were better mens doings were looked into over-strictly and severely, than that there should be a notorious impunity of malefactors; as was well and wisely said of ancient time, "a man were "better live where nothing is lawful, than where all "things are lawful." This therefore rests in your care and conscience, forasmuch as at you justice begins, and the law cannot pursue and chase offenders to their deserved fall, except you first put them up

and discover them, whereby they may be brought to answer; for your verdict is not concluding to condemn, but it is necessary to charge, and without it the court cannot proceed to condemn.

Considering therefore that ye are the eye of justice, ye ought to be single, without partial affection; watchful, not asleep, or false asleep in winking at offenders, and sharp-sighted to proceed with understanding and discretion: for in a word, if you shall not present unto the court all such offences, as shall appear unto you either by evidence given in, or otherwise, mark what I say, of your own knowledge, which have been committed within the verge, which is as it were the limits of your survey, but shall smother and conceal any offence willingly, then the guiltiness of others will cleave to your consciences before God; and besides, you are answerable in some degree to the King and his law for such your default and suppression; and therefore take good regard unto it, you are to serve the King and his people, you are to keep and observe your oath, you are to acquit yourselves.

But there is yet more cause why you should take more special regard to your presentments, than any other grand juries within the counties of this kingdom at large: for as it is a nearer degree and approach unto the King, which is the fountain of justice and government, to be the King's servant, than to be the King's subject; so this commission ordained for the King's servants and houshold, ought in the execution of justice to be exemplary unto other places. David saith, who was a king, "The wicked man shall not "abide in my house;" as taking knowledge that it was impossible for Kings to extend their care, to banish wickedness over all their land or empire; but yet at least they ought to undertake to God for their house.

We see further, that the law doth so esteem the dignity of the King's settled mansion-house, as it hath laid unto it a plot of twelve miles round, which we call the verge, to be subject to a special and exempted jurisdiction depending upon his person and great officers. This is as a half-pace or carpet spread about

the King's chair of estate, which therefore ought to be cleared and voided more than other places of the kingdom; for if offences should be shrouded under the King's wings, what hope is there of discipline and good justice in more remote parts? We see the sun, when it is at the brightest, there may be perhaps a bank of clouds in the north, or the west, or remote regions, but near his body few or none; for where the King cometh, there should come peace and order, and an awe and reverence in mens hearts.

Articuli super Chartas, c. 3. 13 R. 2. c. 3. 33 H. 8. c. 12.

And this jurisdiction was in ancient time executed, and since by statute ratified, by the lord steward with great ceremony, in the nature of a peculiar King's bench for the verge; for it was thought a kind of eclipsing to the King's honour, that where the King was, any justice should be sought but immediately from his own officers. But in respect that office was oft void, this commission hath succeeded, which change I do not dislike; for though it hath less state, yet it hath more strength legally: therefore I say, you that are a jury of the verge, should lead and give a pattern unto others in the care and conscience of your presentments.

Concerning the particular points and articles whereof you shall inquire, I will help your memory and mine own with order; neither will I load you, or trouble myself with every branch of several offences, but stand upon those that are principal and most in use: the offences therefore that you are to present are of four natures.

I. The first, such as concern God and his Church.

II. The second, such as concern the King and his state.

III. The third, such as concern the King's people, and are capital.

IV. The fourth, such as concern the King's people, not capital.

God and his Church.

THE service of almighty God, upon whose blessing the peace, safety, and good estate of King and kingdom doth depend, may be violated, and God disho-

noured in three manners, by profanation, by contempt, and by division, or breach of unity.

First, if any man hath depraved or abused in word or deed the blessed sacrament, or disturbed the preacher or congregation in the time of divine service; or if any have maliciously stricken with weapon, or drawn weapon in any church or church-yard; or if any fair or market have been kept in any church-yard, these are profanations within the purview of several statutes, and those you are to present: for holy things, actions, times, and sacred places, are to be preserved in reverence and divine respect.

Profanations. 1 E. 6. c. 1. et 1 El. c. 2. 1 M. c. 3. 5 E. 6. c. 4. 13 E. 1. Stat. of Winton.

For contempts of our Church and service, they are comprehended in that known name, which too many, if it pleased God, bear, recusancy; which offence hath many branches and dependencies; the wife-recusant, she tempts; the church-papist, he feeds and relieves; the corrupt schoolmaster, he soweth tares; the dissembler, he comformeth and doth not communicate. Therefore if any person, man or woman, wife or sole, above the age of sixteen years, not having some lawful excuse, have not repaired to church according to the several statutes; the one, for the weekly, the other, for the monthly repair, you are to present both the offence and the time how long. Again, such as maintain, relieve, keep in service of livery recusants, though themselves be none, you are likewise to present; for these be like the roots of nettles, which sting not themselves, but bear and maintain the stinging leaves: so if any that keepeth a schoolmaster that comes not to church, or is not allowed by the bishop, for that infection may spread far: so such recusants as have been convicted and conformed, and have not received the sacrament once a year, for that is the touch-stone of their true conversion: and of these offences of recusancy take you special regard. Twelve miles from court is no region for such subjects. In the name of God, why should not twelve miles about the King's chair be as free from papist-recusants, as twelve miles from the city of Rome, the Pope's chair, is from protestants? There be hypocrites and atheists, and so

Contempts, namely, Recusancy.

I fear there be amongst us; but no open contempt of their religion is endured. If there must be recusants, it were better they lurked in the country, than here in the bosom of the kingdom.

Breach of unity.

For matter of division and breach of unity, it is not without a mystery that Christ's coat had no seam, nor no more should the Church if it were possible. Therefore if any minister refuse to use the book of Common-prayer, or wilfully swerveth in divine service from that book; or if any person whatsoever do scandalize that book, and speak openly and maliciously in derogation of it; such men do but make a rent in the garment, and such are by you to be inquired of. But much more, such as are not only differing, but in a sort opposite unto it, by using a superstitious and corrupted form of divine service; I mean, such as say or hear mass.

These offences which I have recited to you, are against the service and worship of God: there remain two which likewise pertain to the dishonour of God; the one, is the abuse of his name by perjury; the other, is the adhering to God's declared enemies, evil and out-cast spirits, by conjuration and witchcraft.

Perjury.

For perjury, it is hard to say whether it be more odious to God, or pernicious to man; for an oath, saith the apostle, is the end of controversies: if therefore that boundary of suits be taken away or mis-set, where shall be the end? Therefore you are to inquire of wilful and corrupt perjury in any of the King's courts, yea, of court-barons and the like, and that as well of the actors, as of the procurer and suborner.

Conjuration and witchcraft. 1 Jac. c. 1. 2.

For witchcraft, by the former law it was not death, except it were actual and gross invocation of evil spirits, or making covenant with them, or taking away life by witchcraft: but now by an act in his Majesty's times, charms and sorceries in certain cases of procuring of unlawful love or bodily hurt, and some others, are made felony the second offence; the first being imprisonment and pillory.

Supremacy placed with offences of state.

And here I do conclude my first part concerning religion and ecclesiastical causes: wherein it may be thought that I do forget matters of supremacy, or of

Jesuits, and seminaries, and the like, which are usually sorted with causes of religion: but I must have leave to direct myself according to mine own persuasion, which is, that, whatsoever hath been said or written on the other side, all the late statutes, which inflict capital punishment upon extollers of the Pope's supremacy, deniers of the King's supremacy, Jesuits and seminaries, and other offenders of that nature, have for their principal scope, not the punishment of the error of conscience, but the repressing of the peril of the estate. This is the true spirit of these laws, and therefore I will place them under my second division, which is of offences that concern the King and his estate, to which now I come.

THESE offences therefore respect either the safety of the King's person, or the safety of his estate and kingdom, which though they cannot be dissevered in deed, yet they may be distinguished in speech. First then, if any have conspired against the life of the King, which God have in his custody! or of the Queen's Majesty, or of the most noble Prince their eldest son; the very compassing and inward imagination thereof is high treason, if it can be proved by any fact that is overt: for in the case of so sudden, dark, and pernicious, and peremptory attempts, it were too late for the law to take a blow before it gives; and this high treason of all other is most heinous, of which you shall inquire, though I hope there be no cause.

The King and the state.

The King's person.

There is another capital offence that hath an affinity with this, whereof you here within the verge are most properly to inquire; the King's privy-council are as the principal watch over the safety of the King, so as their safety is a portion of his: if therefore any of the King's servants within his cheque-roll, for to them only the law extends, have conspired the death of any the King's privy-council, this is felony, and thereof you shal inquire.

Privy-council.

And since we are now in that branch of the King's person, I will speak also of the King's person by representation, and the treasons which touch the same.

Representation of his person.

The King's person and authority is represented in three things; in his seals, in his monies, and in his principal magistrates: if therefore any have counterfeited the King's great seal, privy seal, or seal manual; or counterfeited, clipped, or scaled his monies, or other monies current, this is high treason; so is it to kill certain great officers or judges executing their office.

The estate.

We will now pass to those treasons which concern the safety of the King's estate, which are of three kinds, answering to three perils which may happen to an estate; these perils are, foreign invasion, open rebellion and sedition, and privy practice to alienate and estrange the hearts of the subjects, and to prepare them either to adhere to enemies, or to burst out into tumults and commotions of themselves.

Invasion and rebellion.

Therefore if any person have solicited or procured any invasion from foreigners; or if any have combined to raise and stir the people to rebellion within the realm; these are high treasons, tending to the overthrow of the estate of this commonwealth, and to be inquired of.

Alienation of hearts.

The third part of practice hath divers branches, but one principal root in these our times, which is the vast and over-spreading ambition and usurpation of the see of Rome; for the Pope of Rome is, according to his late challenges and pretences, become a competitor and corrival with the King, for the hearts and obediences of the King's subjects: he stands for it, he sends over his love-tokens and brokers, under colour of conscience, to steal and win away the hearts and allegiances of the people, and to make them as fuel ready to take fire upon any his commandments.

This is that yoke which this kingdom hath happily cast off, even at such time when the popish religion was nevertheless continued, and that divers states, which are the Pope's vassals, do likewise begin to shake off.

Supremacy, treason, etc. 5 Eliz. cap. 1. Jesuits. 3 Jac. cap. 4, et 5.

If therefore any person have maintained and extolled the usurped authority of the bishop of Rome within the King's dominions, by writing, preaching, or deed, advisedly, directly and maliciously; or if any

person have published or put in use any of the Pope's bulls or instruments of absolution; or if any person have withdrawn, and reconciled, any of the King's subjects from their obedience, or been withdrawn and reconciled; or if any subject have refused the second time to take the oath of supremacy lawfully tendred; or if any Jesuit or seminary come and abide within this realm; these are by several statutes made cases of high treason, the law accounting these things as preparatives, and the first wheels and secret motions of seditions and revolts from the King's obedience. Of these you are to inquire, both of the actors and of their abettors, comforters, receivers, maintainers; and concealers, which in some cases are traitors, as well as the principal, in some cases in *præmunire*, in some other, in misprision of treason, which I will not stand to distinguish, and in some other, felony; as namely, that of the receiving and relieving of Jesuits and priests; the bringing in and dispersing of *Agnus Dei's*, crosses, pictures, or such trash, is likewise *præmunire:* and so is the denial to take the oath of supremacy the first time.

28 El. cap. 1.

13 El. cap. 2.

23 El. cap. 1.

Agnus Dei's.

And because in the disposition of a state to troubles and perturbations, military men are most tickle and dangerous; therefore if any of the King's subjects go over to serve in foreign parts, and do not first endure the touch, that is, to take the oath of allegiance; or if he have born office in any army, and do not enter into bond with sureties as is prescribed, this is made felony; and such as you shall inquire.

Military men.

Lastly, because the vulgar people are sometimes led with vain and fond prophecies; if any such shall be published, to the end to move stirs or tumults, this is not felony, but punished by a year's imprisonment and loss of goods; and of this also shall you inquire.

Prophecies.

You shall likewise understand that the escape of any prisoner committed for treason, is treason; whereof you are likewise to inquire.

Now come I to the third part of my division; that is, those offences which concern the King's people, and are capital; which nevertheless the law terms

The people, capital.

offences against the crown, in respect of the protection that the King hath of his people, and the interest he hath in them and their welfare; for touch them, touch the King. These offences are of three natures: the first concerneth the conservation of their lives; the second, of honour and honesty of their persons and families; and the third, of their substance.

Life. First for life. I must say unto you in general, that life is grown too cheap in these times, it is set at the price of words, and every petty scorn and disgrace can have no other reparation; nay so many mens lives are taken away with impunity, that the very life of the law is almost taken away, which is the execution; and therefore though we cannot restore the life of those men that are slain, yet I pray let us restore the law to her life, by proceeding with due severity against the offenders; and most especially this plot of ground, which, as I said, is the King's carpet, ought not to be stained with blood, crying in the ears of God and the King. It is true nevertheless, that the law doth make divers just differences of life taken away; but yet no such differences as the wanton humours and braveries of men have under a reverend name of honour and reputation invented.

The highest degree is where such a one is killed, unto whom the offender did bear faith and obedience; as the servant to the master, the wife to the husband, the clerk to the prelate; and I shall ever add, for so I conceive of the law, the child to the father or the mother; and this the law terms petty treason.

The second is, Where a man is slain upon forethought malice, which the law terms murder; and it is an offence horrible and odious, and cannot be blanched, nor made fair, but foul.

The third is, Where a man is killed upon a sudden heat or affray, whereunto the law gives some little favour, because a man in fury is not himself, *ira furor brevis*, wrath is a short madness; and the wisdom of law in his Majesty's time hath made a subdivision of the stab given, where the party stabbed is out of defence, and had not given the first blow, from other manslaughters.

1 Jac. cap. 8.

The fourth degree is, That of killing a man in the party's own defence, or by misadventure, which though they be not felonies, yet nevertheless the law doth not suffer them to go unpunished: because it doth discern some sparks of a bloody mind in the one, and of carelessness in the other.

And the fifth is, Where the law doth admit a kind of justification, not by plea, for a man may not, that hath shed blood, affront the law with pleading not guilty; but when the case is found by verdict, being disclosed upon the evidence; as where a man in the King's highway and peace is assailed to be murdered or robbed; or when a man defending his house, which is his castle, against unlawful violence; or when a sheriff or minister of justice is resisted in the execution of his office; or when the patient dieth in the chirurgeon's hands, upon cutting or otherwise: for these cases the law doth privilege, because of the necessity, and because of the innocency of the intention.

Thus much for the death of man, of which cases you are to inquire: together with the accessories before and after the fact.

For the second kind, which concerns the honour and chasteness of persons and families; you are to inquire of the ravishment of women, of the taking of women out of the possession of their parents or guardians against their will, or marrying them, or abusing them; of double marriages, where there was not first seven years absence, and no notice that the party so absent was alive, and other felonies against the honesty of life. Honesty of life. 1 Jac. cap. 11.

For the third kind, which concerneth mens substance, you shall inquire of burglaries, robberies, cutting of purses, and taking of any thing from the person: and generally other stealths, as well such as are plain, as those that are disguised, whereof I will by and by speak: but first I must require you to use diligence in presenting especially those purloinings and imbezlements, which are of plate, vessel, or whatsoever within the King's house. The King's house is an open place; it ought to be kept safe by law, and not by lock, and therefore needeth the more severity. Substance.

28 E. 1. *Articuli super chartas*, c. 2. 31 El. c. 4. 33 H. 6. c. 1. 21 H. 8. c. 7.

Now for coloured and disguised robberies; I will name two or three of them: the purveyor that takes without warrant, is no better than a thief, and it is felony. The servant that hath the keeping of his Majesty's goods, and going away with them, though he came to the possession of them lawfully, it is felony. Of these you shall likewise inquire, principals and accessories. The voluntary escape of a felon is also felony.

The people, not capital.

For the last part, which is of offences concerning the people not capital, they are many: but I will select only such as I think fittest to be remembered unto you, still dividing, to give you the better light. They are of four natures.

1. The first, is matter of force and outrage.
2. The second, matter of fraud and deceit.
3. Public nuisances and grievances.
4. The fourth, breach and inobservance of certain wholesome and politic laws for government.

Force.

For the first, you shall inquire of riots and unlawful assemblies of forcible entries, and detainers with force; and properly of all assaults of striking, drawing weapon or other violence within the King's house, and the precincts thereof: for the King's house, from whence example of peace should flow unto the farthest parts of the kingdom, as the ointment of Aaron's head to the skirts of his garment, ought to be sacred and inviolate from force and brawls, as well in respect of reverence to the place, as in respect of danger of greater tumult, and of ill example to the whole kingdom; and therefore in that place all should be full of peace, order, regard, forbearance, and silence.

Besides open force, there is a kind of force that cometh with an armed hand, but disguised, that is no less hateful and hurtful; and that is, abuse and oppression by authority. And therefore you shall inquire of all extortions, in officers and ministers; as sheriffs, bailiffs of hundreds, escheators, coroners, constables, ordinaries, and others, who by colour of office do poll the people.

For frauds and deceits, I do chiefly commend to your care the frauds and deceits in that which is the chief means of all just contract and permutation, which is, weights and measures; wherein, although God hath pronounced that a false weight is an abomination, yet the abuse is so common and so general, I mean of weights, and I speak upon knowledge and late examination, that if one were to build a church, he should need but false weights, and not seek them far, of the piles of brass to make the bells, and the weights of lead to make the battlements: and herein you are to make special inquiry, whether the clerk of the market within the verge, to whom properly it appertains, hath done his duty.

For nuisances and grievances, I will for the present only single out one, that ye present the decays of highways and bridges; for where the majesty of a King's house draws recourse and access, it is both disgraceful to the King, and diseaseful to the people, if the ways near-abouts be not fair and good; wherein it is strange to see the chargeable pavements and causeways in the avenues and entrances of towns abroad beyond the seas; whereas London, the second city at the least of Europe, in glory, in greatness, and in wealth, cannot be discerned by the fairness of the ways, though a little perhaps by the broadness of them, from a village. **Nuisance.**

For the last part, because I pass these things over briefly, I will make mention unto you of three laws. **Breach of statutes.**

1. The one, concerning the King's pleasure.
2. The second, concerning the people's food.
3. And the third, concerning wares and manufactures.

You shall therefore inquire of the unlawful taking partridges and pheasants or fowl, the destruction of the eggs of the wild-fowl, the killing of hares or deer, and the selling of venison or hares: for that which is for exercise, and sport, and courtesy, should not be turned to gluttony and sale victual. **King's pleasure.**

You shall also inquire whether bakers and brewers keep their assize, and whether as well they as butchers, innholders and victuallers, do sell that which is whole- **Food.**

some, and at reasonable prices, and whether they do link and combine to raise prices.

Manufactures.

Lastly, you shall inquire whether the good statute be observed, whereby a man may have that he thinketh he hath, and not be abused or mis-served in that he buys: I mean that statute that requireth that none use any manual occupation but such as have been seven years apprentice to it; which law being generally transgressed, makes the people buy in effect chaff for corn; for that which is mis-wrought will mis-wear.

5 Eliz. c. 4.

There be many more things inquirable by you throughout all the former parts, which it were overlong in particular to recite. You may be supplied either out of your own experience, or out of such bills and informations as shall be brought unto you, or upon any question that you shall demand of the court, which will be ready to give you any farther direction as far as is fit: but these which I have gone through, are the principal points of your charge; which to present, you have taken the name of God to witness; and in the name of God perform it.

A

CHARGE

DELIVERED BY

SIR FRANCIS BACON, KNIGHT,

THE KING'S SOLICITOR-GENERAL,

AT THE

ARRAIGNMENT OF THE LORD SANQUHAR,

IN THE KING'S BENCH AT WESTMINSTER.

THE ARGUMENT.

The Lord Sanquhar, a Scotch nobleman, having, in private revenge, suborned Robert Carlile to murder John Turner, master of fence, thought, by his greatness, to have born it out; but the King, respecting nothing so much as justice, would not suffer nobility to be a shelter for villainy; but, according to law, on the 29th of June, 1612, *the said Lord Sanquhar, having been arraigned and condemned, by the name of Robert Creighton, Esq. was before Westminster-hall Gate executed, where he died very penitent. At whose arraignment my Lord Bacon, then Solicitor-General to King James, made this speech following:*

In this cause of life and death, the jury's part is in effect discharged; for after a frank and formal confession, their labour is at an end: so that what hath been said by Mr. Attorney, or shall be said by myself, is rather convenient than necessary.

My lord Sanquhar, your fault is great, and cannot be extenuated, and it need not be aggravated; and if it needed, you have made so full an anatomy of it out of your own feeling, as it cannot be matched by myself, or any man else, out of conceit; so as that part of aggravation I leave. Nay, more, this Christian and penitent course of yours draws me thus far, that I will

agree, in some sort extenuates it: for certainly, as even in extreme evils there are degrees; so this particular of your offence is such, as though it be foul spilling of blood, yet there are more foul: for if you had sought to take away a man's life for his vineyard, as Ahab did; or for envy, as Cain did; or to possess his bed, as David did; surely the murder had been more odious.

Your temptation was revenge, which the more natural it is to man, the more have laws both divine and human sought to repress it; *Mihi vindicta.* But in one thing you and I shall never agree, that generous spirits, you say, are hard to forgive: no, contrariwise, generous and magnanimous minds are readiest to forgive; and it is a weakness and impotency of mind to be unable to forgive;

Corpora magnanimo satis est prostrasse leoni.

But howsoever murders may arise from several motives, less or more odious, yet the law both of God and man involves them in one degree, and therefore you may read that in Joab's case, which was a murder upon revenge, and matcheth with your case; he for a dear brother, and you for a dear part of your own body; yet there was a severe charge given, it should not be unpunished.

And certainly the circumstance of time is heavy upon you: it is now five years since this unfortunate man Turner, be it upon accident, or be it upon despite, gave the provocation, which was the seed of your malice. All passions are suaged with time: love, hatred, grief; all fire itself burns out with time, if no new fuel be put to it. Therefore for you to have been in the gall of bitterness so long, and to have been in a restless chace of this blood so many years, is a strange example; and I must tell you plainly, that I conceive you have sucked those affections of dwelling in malice, rather out of Italy and outlandish manners, where you have conversed, than out of any part of this island, England or Scotland.

But that which is fittest for me to spend time in, the matter being confessed, is to set forth and magnify to the hearers the justice of this day; first of God, and then of the King.

My lord, you have friends and entertainments in foreign parts; it had been an easy thing for you to set Carlile, or some other bloodhound on work, when your person had been beyond the seas; and so this news might have come to you in a packet, and you might have looked on how the storm would pass: but God bereaved you of this foresight, and closed you here under the hand of a King, that though abundant in clemency, yet is no less zealous of justice.

Again, when you came in at Lambeth, you might have persisted in the denial of the procurement of the fact; Carlile, a resolute man, might perhaps have cleared you, for they that are resolute in mischief, are commonly obstinate in concealing the procurers, and so nothing should have been against you but presumption. But then also God, to take away all obstruction of justice, gave you the grace, which ought indeed to be more true comfort to you, than any device whereby you might have escaped, to make a clear and plain confession.

Other impediments there were, not a few, which might have been an interruption to this day's justice, had not God in his providence removed them.

But, now that I have given God the honour, let me give it likewise where it is next due, which is, to the King our sovereign.

This murder was no sooner committed, and brought to his Majesty's ears, but his just indignation, wherewith he first was moved, cast itself into a great deal of care and providence to have justice done. First came forth his proclamation, somewhat of a rare form, and devised, and in effect dictated by his Majesty himself; and by that he did prosecute the offenders, as it were with the breath and blast of his mouth. Then did his Majesty stretch forth his long arms, for Kings have long arms when they will extend them, one of them to the sea, where he took hold of Grey

shipped for Sweden, who gave the first light of testimony; the other arm to Scotland, and took hold of Carlile, ere he was warm in his house, and brought him the length of his kingdom under such safe watch and custody, as he could have no means to escape, no nor to mischief himself, no nor learn any lessons to stand mute; in which cases, perhaps, this day's justice might have received a stop. So that I may conclude his Majesty hath shewed himself God's true lieutenant, and that he is no respecter of persons; but the English, Scotish, nobleman, fencer, are to him alike in respect of justice.

Nay, I must say farther, that his Majesty hath had, in this, a kind of prophetical spirit; for what time Carlile and Grey, and you, my lord, yourself, were fled no man knew whither, to the four winds, the King ever spake in a confident and undertaking manner, that wheresoever the offenders were in Europe, he would produce them forth to justice; of which noble word God hath made him master.

Lastly, I will conclude towards you, my lord, that though your offence hath been great, yet your confession hath been free, and your behaviour and speech full of discretion; and this shews, that though you could not resist the tempter, yet you bear a Christian and generous mind, answerable to the noble family of which you are descended. This I commend unto you, and take it to be an assured token of God's mercy and favour, in respect whereof all worldly things are but trash; and so it is fit for you, as your state now is, to account them. And this is all I will say for the present.

[*Note*, The reader, for his fuller information in this story of the lord Sanquhar, is desired to peruse the case in the ninth book of the lord Coke's Reports; at the end of which the whole series of the murder and trial is exactly related.]

THE

CHARGE

OF

SIR FRANCIS BACON, KNIGHT,

THE KING'S ATTORNEY-GENERAL,

TOUCHING

DUELS.

Upon an Information in the Star-Chamber against Priest and Wright.

With the DECREE of the Star-Chamber in the same Cause.

My Lords,

I THOUGHT it fit for my place, and for these times, to bring to hearing before your lordships some cause touching private duels, to see if this court can do any good to tame and reclaim that evil which seems unbridled. And I could have wished that I had met with some greater persons, as a subject for your censure, both because it had been more worthy of this presence, and also the better to have shewed the resolution myself hath to proceed without respect of persons in this business: but finding this cause on foot in my predecessor's time, and published and ready for hearing, I thought to lose no time in a mischief that groweth every day: and besides, it passes not amiss sometimes in government, that the greater sort be admonished by an example made in the meaner, and the dog to be beaten before the lion. Nay, I should think, my lords, that men of birth and quality will leave the practice when it begins to be vilified, and come so low as to barber-surgeons and butchers, and such base mechanical persons.

And for the greatness of this presence, in which I take much comfort, both as I consider it in itself, and much more in respect it is by his Majesty's direction, I will supply the meanness of the particular cause, by

handling of the general point: to the end, that by the occasion of this present cause, both my purpose of prosecution against duels, and the opinion of the court, without which I am nothing, for the censure of them, may appear, and thereby offenders in that kind may read their own case, and know what they are to expect; which may serve for a warning until example may be made in some greater person: which I doubt the times will but too soon afford.

Therefore before I come to the particular, whereof your lordships are now to judge, I think it time best spent to speak somewhat:

First, Of the nature and greatness of this mischief.

Secondly, Of the causes and remedies.

Thirdly, Of the justice of the law of England, which some stick not to think defective in this matter.

Fourthly, Of the capacity of this court, where certainly the remedy of this mischief is best to be found.

And fifthly, Touching mine own purpose and resolution, wherein I shall humbly crave your lordships aid and assistance.

For the mischief itself, it may please your lordships to take into your consideration that when revenge is once extorted out of the magistrates hands, contrary to God's ordinance, *Mihi vindicta, ego retribuam*, and every man shall bear the sword, not to defend, but to assail; and private men begin once to presume to give law to themselves, and to right their own wrongs, no man can foresee the danger and inconveniences that may arise and multiply thereupon. It may cause sudden storms in court, to the disturbance of his Majesty, and unsafety of his person: it may grow from quarrels to bandying, and from bandying to trooping, and so to tumult and commotion; from particular persons to dissension of families and alliances; yea, to national quarrels, according to the infinite variety of accidents, which fall not under foresight: so that the state by this means shall be like to a distempered and imperfect body, continually subject to inflammations and convulsions.

Besides, certainly, both in divinity and in policy, offences of presumption are the greatest. Other offences yield and consent to the law that it is good, not daring to make defence, or to justify themselves; but this offence expressly gives the law an affront, as if there were two laws, one a kind of gown-law, and the other a law of reputation, as they term it; so that Paul's and Westminster, the pulpit and the courts of justice, must give place to the law, as the King speaketh in his proclamation, of ordinary tables, and such reverend assemblies: the year-books and statute-books must give place to some French and Italian pamphlets, which handle the doctrine of duels, which if they be in the right, *transeamus ad illa*, let us receive them, and not keep the people in conflict and distraction between two laws.

Again, my lords, it is a miserable effect, when young men full of towardness and hope, such as the poets call *auroræ filii*, sons of the morning, in whom the expectation and comfort of their friends consisteth, shall be cast away and destroyed in such a vain manner; but much more it is to be deplored when so much noble and genteel blood should be spilt upon such follies, as, if it were adventured in the field in service of the King and realm, were able to make the fortune of a day, and to change the fortune of a kingdom. So as your lordships see what a desperate evil this is; it troubleth peace, it dis-furnisheth war, it bringeth calamity upon private men, peril upon the state, and contempt upon the law.

Touching the causes of it; the first motive, no doubt, is a false and erroneous imagination of honour and credit: and therefore the King, in his last proclamation, doth most aptly and excellently call them bewitching duels. For, if one judge of it truly, it is no better than a sorcery that enchanteth the spirits of young men, that bear great minds with a false shew, *species falsa*; and a kind of satanical illusion and apparition of honour against religion, against law, against moral virtue, and against the precedents and examples of the best times and valiantest nations; as I shall tell

you by and by, when I shall shew you the law of England is not alone in this point.

But then the seed of this mischief being such, it is nourished by vain discourses, and green and unripe conceits, which nevertheless have so prevailed, as though a man were staid and sober-minded, and a right believer touching the vanity and unlawfulness of these duels; yet the stream of vulgar opinion is such, as it imposeth a necessity upon men of value to conform themselves, or else there is no living or looking upon mens faces: so that we have not to do, in this case, so much with particular persons, as with unsound and depraved opinions, like the dominations and spirits of the air which the Scripture speaketh of.

Hereunto may be added, that men have almost lost the true notion and understanding of fortitude and valour. For fortitude distinguisheth of the grounds of quarrels whether they be just; and not only so, but whether they be worthy; and setteth a better price upon mens lives than to bestow them idly: nay, it is weakness and dis-esteem of a man's self, to put a man's life upon such liedger performances: a man's life is not to be trifled away; it is to be offered up and sacrificed to honourable services, public merits, good causes, and noble adventures. It is in expence of blood as it is in expence of money; it is no liberality to make a profusion of money upon every vain occasion, nor no more it is fortitude to make effusion of blood, except the cause be of worth. And thus much for the causes of this evil.

For the remedies, I hope some great and noble person will put his hand to this plough, and I wish that my labours of this day may be but forerunners to the work of a higher and better hand. But yet to deliver my opinion as may be proper for this time and place, there be four things that I have thought on, as the most effectual for the repressing of this depraved custom of particular combats.

The first is, that there do appear and be declared a constant and settled resolution in the state to abolish it. For this is a thing, my lords, must go down at

once, or not at all; for then every particular man will think himself acquitted in his reputation, when he sees that the state takes it to heart, as an insult against the King's power and authority, and thereupon hath absolutely resolved to master it; like unto that which was set down in express words in the edict of Charles IX. of France touching duels, that the King himself took upon him the honour of all that took themselves grieved or interested for not having performed the combat. So must the state do in this business: and in my conscience there is none that is but of a reasonable sober disposition, be he never so valiant, except it be some furious person that is like a firework, but will be glad of it, when he shall see the law and rule of state disinterest him of a vain and unnecessary hazard.

Secondly, Care must be taken that this evil be no more cockered, nor the humour of it fed; wherein I humbly pray your lordships that I may speak my mind freely, and yet be understood aright. The proceedings of the great and noble commissioners martial I honour and reverence much, and of them I speak not in any sort; but I say the compounding of quarrels, which is otherwise in use by private noblemen and gentlemen, it is so punctual, and hath such reference and respect unto the received conceits, what's before-hand, and what's behind-hand, and I cannot tell what, as without all question it doth, in a fashion, countenance and authorize this practice of duels, as if it had in it somewhat of right.

Thirdly, I must acknowledge that I learned out of the King's last proclamation, the most prudent and best applied remedy for this offence, if it shall please his Majesty to use it, that the wit of man can devise. This offence, my lords, is grounded upon a false conceit of honour, and therefore it would be punished in the same kind, *in eo quis rectissime plectitur, in quo peccat.* The fountain of honour is the King and his aspect, and the access to his person continueth honour in life, and to be banished from his presence is one of the greatest eclipses of honour that can be; if his Ma-

jesty shall be pleased that when this court shall censure any of these offences in persons of eminent quality, to add this out of his own power and discipline, that these persons shall be banished and excluded from his court for certain years, and the courts of his Queen and prince, I think there is no man that hath any good blood in him will commit an act that shall cast him into that darkness, that he may not behold his sovereign's face.

Lastly, and that which more properly concerneth this court: we see, my lords, the root of this offence is stubborn; for it despiseth death, which is the utmost of punishments; and it were a just but a miserable severity, to execute the law without all remission or mercy, where the case proveth capital. And yet the late severity in France was more, where, by a kind of martial law, established by ordinance of the King and parliament, the party that had slain another was presently had to the gibbet, insomuch as gentlemen of great quality were hanged, their wounds bleeding, lest a natural death should prevent the example of justice. But, my lords, the course which we shall take is of far greater lenity, and yet of no less efficacy; which is to punish, in this court, all the middle acts and proceedings which tend to the duel, which I will enumerate to you anon, and so to hew and vex the root in the branches, which, no doubt, in the end will kill the root, and yet prevent the extremity of law.

Now for the law of England, I see it excepted to, though ignorantly, in two points:

The one, That it should make no difference between an insidious and foul murder, and the killing of a man upon fair terms, as they now call it.

The other, That the law hath not provided sufficient punishment, and reparations, for contumely of words, as the lye, and the like.

But these are no better than childish novelties against the divine law, and against all laws in effect, and against the examples of all the bravest and most virtuous nations of the world.

For first, for the law of God, there is never to be found any difference made in homicide, but between ho-

micide voluntary, and involuntary, which we term misadventure. And for the case of misadventure itself, there were cities of refuge; so that the offender was put to his flight, and that flight was subject to accident, whether the revenger of blood should overtake him before he had gotten sanctuary or no. It is true that our law hath made a more subtle distinction between the will inflamed and the will advised, between manslaughter in heat and murder upon prepensed malice or cold blood, as the soldiers call it, an indulgence not unfit for a choleric and warlike nation; for it is true, *ira furor brevis;* a man in fury is not himself. This privilege of passion the ancient Roman law restrained, but to a case: that was, if the husband took the adulterer in the manner; to that rage and provocation only it gave way, that an homicide was justifiable. But for a difference to be made in case of killing and destroying man, upon a fore-thought purpose, between foul and fair, and as it were between single murder and vied murder, it is but a monstrous child of this latter age, and there is no shadow of it in any law divine or human. Only it is true, I find in the Scripture that Cain inticed his brother into the field and slew him treacherously; but Lamech vaunted of his manhood that he would kill a young man, and if it were to his hurt: so as I see no difference between an insidious murder and a braving or presumptuous murder, but the difference between Cain and Lamech.

As for examples in civil states, all memory doth consent, that Græcia and Rome were the most valiant and generous nations of the world; and, that which is more to be noted, they were free estates, and not under a monarchy; whereby a man would think it a great deal the more reason that particular persons should have righted themselves; and yet they had not this practice of duels, nor any thing that bare shew thereof: and sure they would have had it, if there had been any virtue in it. Nay, as he saith, *Fas est et ab hoste doceri.* It is memorable, that is reported by a counsellor ambassador of the emperor's, touching the censure of the Turks of these duels: there was a combat of this

kind performed by two persons of quality of the Turks, wherein one of them was slain, the other party was convented before the council of bashaws; the manner of the reprehension was in these words: "How durst "you undertake to fight one with the other? Are there "not Christians enough to kill? Did you not know "that whether of you shall be slain, the loss would be "the Great Seignior's?" So as we may see that the most warlike nations, whether generous or barbarous, have ever despised this wherein now men glory.

It is true, my lords, that I find combats of two natures authorized, how justly I will not dispute as to the latter of them.

The one, when upon the approaches of armies in the face one of the other, particular persons have made challenges for trial of valours in the field upon the public quarrel.

This the Romans called *Pugna per provocationem.* And this was never, but either between the generals themselves, who are absolute, or between particulars by licence of the generals; never upon private authority. So you see David asked leave when he fought with Goliah; and Joab, when the armies were met, gave leave, and said, "Let the young men play be-"fore us." And of this kind was that famous example in the wars of Naples, between twelve Spaniards and twelve Italians, where the Italians bare away the victory; besides other infinite like examples worthy and laudable, sometimes by singles, sometimes by numbers.

The second combat is a judicial trial of right, where the right is obscure, introduced by the Goths and the Northern nations, but more anciently entertained in Spain; and this yet remains in some cases as a divine lot of battle, though controverted by divines, touching the lawfulness of it: so that a wise writer saith, *Taliter pugnantes videntur tentare Deum, quia hoc volunt ut Deus ostendat et faciat miraculum, ut justam causam habens victor efficiatur, quod sæpe contra accidit.* But howsoever it be, this kind of fight taketh its warrant from law. Nay, the French themselves,

whence this folly seemeth chiefly to have flown, never had it but only in practice and toleration, and never as authorized by law; and yet now of late they have been fain to purge their folly with extreme rigour, in so much as many gentlemen left between death and life in the duels, as I spake before, were hastened to hanging with their wounds bleeding. For the state found it had been neglected so long, as nothing could be thought cruelty which tended to the putting of it down.

As for the second defect pretended in our law, that it hath provided no remedy for lies and fillips, it may receive like answer. It would have been thought a madness amongst the ancient lawgivers, to have set a punishment upon the lye given, which in effect is but a word of denial, a negative of another's saying. Any lawgiver, if he had been asked the question, would have made Solon's answer: That he had not ordained any punishment for it, because he never imagined the world would have been so fantastical as to take it so highly. The civilians, they dispute whether an action of injury lie for it, and rather resolve the contrary. And Francis the first of France, who first set on and stamped this disgrace so deep, is taxed by the judgment of all wise writers for beginning the vanity of it; for it was he, that when he had himself given the lye and defy to the Emperor, to make it current in the world, said in a solemn assembly, "That he was no "honest man that would bear the lye:" which was the fountain of this new learning.

As for words of reproach and contumely, whereof the lye was esteemed none, it is not credible, but that the orations themselves are extant, what extreme and exquisite reproaches were tossed up and down in the senate of Rome and the places of assembly, and the like in Græcia, and yet no man took himself fouled by them, but took them but for breath, and the stile of an enemy, and either despised them or returned them, but no blood spilt about them.

So of every touch or light blow of the person, they are not in themselves considerable, save that they have

got upon them the stamp of a disgrace, which maketh these light things pass for great matter. The law of England, and all laws, hold these degrees of injury to the person, slander, battery, maim, and death; and if there be extraordinary circumstances of despite and contumely, as in case of libels, and bastinadoes, and the like, this court taketh them in hand, and punisheth them exemplarily. But for this apprehension of a disgrace, that a fillip to the person should be a mortal wound to the reputation, it were good that men did hearken unto the saying of Consalvo, the great and famous commander, that was wont to say, a gentleman's honour should be *de tela crassiore*, of a good strong warp or web, that every little thing should not catch in it; when as now it seems they are but of cobweb-lawn, or such light stuff, which certainly is weakness, and not true greatness of mind, but like a sick man's body, that is so tender that it feels every thing. And so much in maintenance and demonstration of the wisdom and justice of the law of the land.

For the capacity of this court, I take this to be a ground infallible: that wheresoever an offence is capital, or matter of felony, though it be not acted, there the combination or practice tending to that offence is punishable in this court as a high misdemeanor. So practice to impoison, though it took no effect; waylaying to murder, though it took no effect, and the like; have been adjudged heinous misdemeanors punishable in this court. Nay, inceptions and preparations in inferior crimes, that are not capital, as suborning and preparing of witnesses that were never deposed, or deposed nothing material, have likewise been censured in this court, as appeareth by the decree in Garnon's case.

Why then, the major proposition being such, the minor cannot be denied: for every appointment of the field is but combination and plotting of murder; let them gild it how they list, they shall never have fairer terms of me in place of justice. Then the conclusion followeth, that it is a case fit for the censure

of the court. And of this there be precedents in the very point of challenge.

It was the case of Wharton, plaintiff against Ellekar and Acklam defendants, where Acklam being a follower of Ellekar's, was censured for carrying a challenge from Ellekar to Wharton, though the challenge was not put in writing, but delivered only by word of message; and there are words in the decree, that such challenges are to the subversion of government.

These things are well known, and therefore I needed not so much to have insisted upon them, but that in this case I would be thought not to innovate any thing of my own head, but to follow the former precedents of the court, though I mean to do it more throughly, because the time requires it more.

Therefore now to come to that which concerneth my part; I say, that by the favour of the King and the court, I will prosecute in this court in the cases following.

If any man shall appoint the field, though the fight be not acted or performed.

If any man shall send any challenge in writing, or any message of challenge.

If any man carry or deliver any writing or message of challenge.

If any man shall accept or return a challenge.

If any man shall accept to be a second in a challenge of either side.

If any man shall depart the realm, with intention and agreement to perform the fight beyond the seas.

If any man shall revive a quarrel by any scandalous bruits or writings, contrary to a former proclamation published by his Majesty in that behalf.

Nay, I hear there be some counsel learned of duels, that tell young men when they are before-hand, and when they are otherwise, and thereby incense and incite them to the duel, and make an art of it; I hope I shall meet with some of them too: and I am sure, my lords, this course of preventing duels in nipping them in the bud, is fuller of clemency and providence

than the suffering them to go on, and hanging men with their wounds bleeding, as they did in France.

To conclude, I have some petitions to make first to your lordship, my lord chancellor, that in case I be advertised of a purpose in any to go beyond the sea to fight, I may have granted his Majesty's writ of *Ne exeat regnum* to stop him, for this giant bestrideth the sea, and I would take and snare him by the foot on this side; for the combination and plotting is on this side, though it should be acted beyond sea. And your lordship said notably the last time I made a motion in this business, that a man may be as well *fur de se*, as *felo de se*, if he steal out of the realm for a bad purpose; as for the satisfying of the words of the writ, no man will doubt but he doth *machinari contra coronam*, as the words of the writ be, that seeketh to murder a subject; for that is ever *contra coronam et dignitatem.* I have also a suit to your lordships all in general, that for justice sake, and for true honour's sake, honour of religion, law, and the King our master, against this fond and false disguise or puppetry of honour, I may in my prosecution, which, it is like enough, may sometimes stir coals, which I esteem not for my particular, but as it may hinder the good service, I may, I say, be countenanced and assisted from your lordships. Lastly, I have a petition to the nobles and gentlemen of England, that they would learn to esteem themselves at a just price. *Non hos quæsitum munus in usus*, their blood is not to be spilt like water or a vile thing; therefore that they would rest persuaded there cannot be a form of honour, except it be upon a worthy matter. But for this, *ipsi viderint*, I am resolved. And thus much for the general, now to the present case.

THE

DECREE OF THE STAR-CHAMBER

AGAINST

DUELS.

n Camera stellata coram concilio ibidem, 26 Januarii, 11 Jac. regis.

PRESENT,

:orge Lord Archbishop of Canterbury.
iomas Lord Ellesmere, Lord Chancellor of England.
ɜnry Earl of Northampton, Lord Privy Seal.
iarles Earl of Nottingham, Lord High Admiral of England.
omas E. of Suffolk, Lord Chamberlain.
hn Lord Bishop of London.
ward Lord Zouch.
lliam Lord Knolles, Treasurer of the Houshold.
Edward Lord Wotton, Comptroller.
John Lord Stanhope, Vice-chamberlain.
Sir Edward Coke, Knight, Lord Chief Justice of England.
Sir Henry Hobart, Knight, Lord Chief Justice of the Common-pleas.
Sir Julius Cæsar, Knight, Chancellor of the Exchequer.

HIS day was heard and debated at large the several ıtters of informations here exhibited by Sir Francis ıcon, knight, his Majesty's attorney-general, the one ainst William Priest, gentleman, for writing and ıding a letter of challenge, together with a stick, ıich should be the length of the weapon: and the her against Richard Wright, esquire, for carrying ıd delivering the said letter and stick unto the party ıallenged, and for other contemptuous and insolent ɜhaviour used before the Justices of the peace in urry at their sessions, before whom he was convented. Ipon the opening of which cause, his Highness's said ttorney-general did first give his reason to the court, hy, in a case which he intended should be a leading se for the repressing of so great a mischief in the

commonwealth, and concerning an offence which reigneth chiefly amongst persons of honour and quality, he should begin with a cause which had passed between so mean persons as the defendants seemed to be: which he said was done, because he found this cause ready published, and in so growing an evil, he thought good to lose no time; whereunto he added, that it was not amiss sometimes to beat the dog before the lion; saying farther, that he thought it would be some motive for persons of high birth and countenance to leave it, when they saw it was taken up by base and mechanical fellows; but concluded, that he resolved to proceed without respect of persons for the time to come, and for the present to supply the meanness of this particular case by insisting the longer upon the general point.

Wherein he did first express unto the court at large the greatness and dangerous consequence of this presumptuous offence, which extorted revenge out of the magistrate's hands, and gave boldness to private men to be lawgivers to themselves; the rather because it is an offence that doth justify itself against the law, and plainly gives the law an affront; describing also the miserable effect which it draweth upon private families, by cutting off young men, otherwise of good hope; and chiefly the loss of the King and the commonwealth, by the casting away of much good blood, which, being spent in the field upon occasion of service, were able to continue the renown which this kingdom hath obtained in all ages of being esteemed victorious.

Secondly, his Majesty's said attorney-general did discourse touching the causes and remedies of this mischief that prevailed so in these times; shewing the ground thereof to be a false and erroneous imagination of honour and credit, according to the term which was given to those duels by a former proclamation of his Majesty's, which called them bewitching duels, for that it was no better than a kind of sorcery, which enchanteth the spirits of young men, which bear great minds, with a shew of honour in that which is no honour indeed; being against religion, law, moral vir-

tue, and against the precedents and examples of the best times, and valiantest nations of the world; which though they excelled for prowess and military virtue in a public quarrel, yet know not what these private duels meant; saying farther, that there was too much way and countenance given unto these duels, by the course that is held by noblemen and gentlemen in compounding of quarrels, who use to stand too punctually upon conceits of satisfactions and distinctions, what is before-hand, and what behind-hand, which do but feed the humour: adding likewise, that it was no fortitude to shew valour in a quarrel, except there were a just and worthy ground of the quarrel; but that it was weakness to set a man's life at so mean a rate as to bestow it upon trifling occasions, which ought to be rather offered up and sacrificed to honourable services, public merits, good causes, and noble adventures. And as concerning the remedies, he concluded, that the only way was, that the state would declare a constant and settled resolution to master and put down this presumption in private men, of whatsoever degree, of righting their own wrongs, and this to do at once; for that then every particular man would think himself acquitted in his reputation, when that he shall see that the state takes his honour into their own hands, and standeth between him and any interest or prejudice, which he might receive in his reputation for obeying: whereunto he added likewise, that the wisest and mildest way to suppress these duels was rather to punish in this court all the acts of preparation, which did in any wise tend to the duels, as this of challenges and the like, and so to prevent the capital punishment, and to vex the root in the branches, than to suffer them to run on to the execution, and then to punish them capitally after the manner of France: where of late times gentlemen of great quality that had killed others in duel, were carried to the gibbet with their wounds bleeding, lest a natural death should keep them from the example of justice.

Thirdly, His Majesty's said attorney-general did, by many reasons which he brought and alledged, free the

law of England from certain vain and childish exceptions, which are taken by these duellists: the one, because the law makes no difference in punishment between an insidious and foul murder, and the killing a man upon challenge and fair terms, as they call it. The other, for that the law hath not provided sufficient punishment and reparation for contumely of words, as the lye, and the like; wherein his Majesty's said attorney-general did shew, by many weighty arguments and examples, that the law of England did consent with the law of God and the law of nations in both those points, and that this distinction in murder between foul and fair, and this grounding of mortal quarrels upon uncivil and reproachful words, or the like disgraces, was never authorised by any law or ancient examples; but it is a late vanity crept in from the practice of the French, who themselves since have been so weary of it, as they have been forced to put it down with all severity.

Fourthly, His Majesty's said attorney-general did prove unto the court by rules of law and precedents, that this court hath capacity to punish sending and accepting of challenges, though they were never acted nor executed; taking for a ground infallible, that wheresoever an offence is capital or matter of felony, if it be acted and performed, there the conspiracy, combination, or practice tending to the same offence, is punishable as a high misdemeanor, although they never were performed. And therefore, that practice to impoison, though it took no effect, and the like, have been punished in this court; and cited the precedent in Garnon's case, wherein a crime of a much inferior nature, the suborning and preparing of witnesses, though they never were deposed, or deposed nothing material, was censured in this court: whereupon he concluded, that for as much as every appointment of the field is in law but a combination of plotting of a murder, howsoever men might gild it; that therefore it was a case fit for the censure of this court: and therein he vouched a precedent in the very point, that in a case between Wharton plaintiff, and Ellekar and

Acklam defendants; Acklam being a follower of Ellekar, had carried a challenge unto Wharton; and although it were by word of mouth, and not by writing, yet it was severely censured by the court; the decree having words that such challenges do tend to the subversion of government. And therefore his Majesty's attorney willed the standers-by to take notice that it was no innovation that he brought in, but a proceeding according to former precedents of the court, although he purposed to follow it more thoroughly than had been done ever heretofore, because the times did more and more require it. Lastly, his Majesty's said attorney-general did declare and publish to the court in several articles, his purpose and resolution in what cases he did intend to prosecute offences of that nature in this court; that is to say, that if any man shall appoint the field, although the fight be not acted or performed; if any man shall send any challenge in writing or message of challenge; if any man shall carry or deliver any writing or message of challenge; if any man shall accept or return a challenge; if any man shall accept to be a second in a challenge of either part; if any man shall depart the realm with intention and agreement to perform the fight beyond the seas; if any man shall revive a quarrel by any scandalous bruits or writings contrary to a former proclamation, published by his Majesty in that behalf; that in all these cases his Majesty's attorney-general, in discharge of his duty, by the favour and assistance of his Majesty and the court, would bring the offenders, of what state or degree soever, to the justice of this court, leaving the lords commissioners martial to the more exact remedies: adding farther, that he heard there were certain counsel learned of duels, that tell young men when they are before-hand, and when they are otherwise, and did incense and incite them to the duel, and made an art of it; who likewise should not be forgotten. And so concluded with two petitions, the one in particular to the lord chancellor, that in case advertisement were given of a purpose in any to go beyond the seas to fight, there might be granted his Majesty's writ of *Ne*

exeat regnum against him; and the other to the lords in general, that he might be assisted and countenanced in this service.

After which opening and declaration of the general cause, his Majesty's said attorney did proceed to set forth the proofs of this particular challenge and offence now in hand, and brought to the judgment and censure of this honourable court; whereupon it appeared to this honourable court by the confession of the said defendant Priest himself, that he having received some wrong and disgrace at the hands of one Hutchest, did thereupon, in revenge thereof, write a letter to the said Hutchest, containing a challenge to fight with him at single rapier, which letter the said Priest did deliver to the said defendant Wright, together with a stick containing the length of the rapier, wherewith the said Priest meant to perform the fight. Whereupon the said Wright did deliver the said letter to the said Hutchest and did read the same unto him; and after the reading thereof, did also deliver to the said Hutchest the said stick, saying, that the same was the length of the weapon mentioned in the said letter. But the said Hutchest, dutifully respecting the preservation of his Majesty's peace, did refuse the said challenge, whereby no farther mischief did ensue thereupon.

This honourable court, and all the honourable presence this day sitting, upon grave and mature deliberation, pondering the quality of these offences, they generally approved the speech and observations of his Majesty's said attorney-general, and highly commended his great care and good service in bringing a cause of this nature to public punishment and example, and in professing a constant purpose to go on in the like course with others: letting him know, that he might expect from the court all concurrence and assistance in so good a work. And thereupon the court did by their several opinions and sentences declare how much it imported the peace and prosperous estate of his Majesty and his kingdom to nip this practice and offence of duels in the head, which now did overspread and grow universal, even among mean persons, and

was not only entertained in practice and custom, but was framed into a kind of art and precepts: so that, according to the saying of the Scripture, *mischief* is *imagined like a law.* And the court with one consent did declare their opinions: That by the ancient law of the land, all inceptions, preparations and combinations to execute unlawful acts, though they never be performed, as they be not to be punished capitally, except it be in case of treason, and some other particular cases of statute law; so yet they are punishable as misdemeanors and contempts: and that this court was proper for offences of such nature; especially in this case, where the bravery and insolency of the times are such as the ordinary magistrates and justices that are trusted with the preservation of the peace, are not able to master and repress those offences, which were by the court at large set forth, to be not only against the law of God, to whom, and his substitutes, all revenge belongeth, as part of his prerogative, but also against the oath and duty of every subject unto his Majesty, for that the subject doth swear unto him by the ancient law allegiance of life and member; whereby it is plainly inferred, that the subject hath no disposing power over himself of life and member to be spent or ventured according to his own passions and fancies, insomuch as the very practice of chivalry in justs and tournays, which are but images of martial actions, appear by ancient precedents not to be lawful without the King's licence obtained. The court also noted, that these private duels or combats were of another nature from the combats which have been allowed by the law as well of this land as of other nations for the trial of rights or appeals. For that those combats receive direction and authority from the law; whereas these contrariwise spring only from the unbridled humours of private men. And as for the pretence of honour, the court much misliking the confusion of degrees which is grown of late, every man assuming unto himself the term and attribute of honour, did utterly reject and condemn the opinion that the private duel, in any person whatsoever, had any

grounds of honour; as well because nothing can be honourable that is not lawful, and that it is no magnanimity or greatness of mind, but a swelling and tumour of the mind, where there faileth a right and sound judgment; as also for that it was rather justly to be esteemed a weakness, and a conscience of small value in a man's self to be dejected so with a word or trifling disgrace, as to think there is no re-cure of it, but by the hazard of life: whereas true honour in persons that know their own worth is not of any such brittle substance, but of a more strong composition. And finally, the court shewing a firm and settled resolution to proceed with all severity against these duels gave warning to all young noblemen and gentlemen, that they should not expect the like connivance or toleration as formerly have been, but that justice should have a full passage without protection or interruption. Adding, that after a strait inhibition, whosoever should attempt a challenge or combat, in case where the other party was restrained to answer him, as now all good subjects are, did by their own principles receive the dishonour and disgrace upon himself.

And for the present cause, the court hath ordered, adjudged, and decreed, that the said William Priest and Richard Wright be committed to the prison of the Fleet, and the said Priest to pay five hundred pounds, and the said Wright five hundred marks, for their several fines to his Majesty's use. And to the end, that some more public example may be made hereof amongst his Majesty's people, the court hath further ordered and decreed, that the said Priest and Wright shall at the next assizes, to be holden in the county of Surry, publickly, in face of the court, the judges sitting, acknowledge their high contempt and offence against God, his Majesty, and his laws, and shew themselves penitent for the same.

Moreover, the wisdom of this high and honourable court thought it meet and necessary that all sorts of his Majesty's subjects should understand and take notice of that which hath been said and handled this day touching this matter, as well by his Highness's attor-

ney-general, as by the lords judges, touching the law in such cases. And therefore the court hath enjoined Mr. Attorney to have special care to the penning of this decree, for the setting forth in the same summarily the matters and reasons, which have been opened and delivered by the court touching the same; and nevertheless also at some time convenient to publish the particulars of his speech and declaration, as very meet and worthy to be remembered and made known unto the world, as these times are. And this decree, being in such sort carefully drawn and penned, the whole court thought it meet, and so have ordered and decreed, that the same be not only read and published at the next assizes for Surry at such time as the said Priest and Wright are to acknowledge their offences as aforesaid; but that the same be likewise published and made known in all shires of this kingdom. And to that end the justices of assize are required by this honourable court to cause this decree to be solemnly read and published in all the places and sittings of their several circuits, and in the greatest assembly; to the end, that all his Majesty's subjects may take knowledge and understand the opinion of this honourable court in this case, and in what measure his Majesty and this honourable court purposeth to punish such as shall fall into the like contempt and offences hereafter. Lastly, this honourable court much approving that which the right honourable Sir Edward Coke, knight, Lord Chief Justice of England, did now deliver touching the law in this case of duels, hath enjoined his lordship to report the same in print, as he hath formerly done divers other cases, that such as understand not the law in that behalf, and all others, may better direct themselves, and prevent the danger thereof hereafter.

THE

CHARGE

OF

SIR FRANCIS BACON, KNIGHT,

THE KING'S ATTORNEY-GENERAL,

AGAINST

WILLIAM TALBOT,

A COUNSELLOR AT LAW, OF IRELAND,

Upon an Information in the Star-Chamber *Ore tenus*, for a Writing under his Hand, whereby the said William Talbot being demanded, Whether the Doctrine of Saurez, touching deposing and killing of Kings excommunicated, were true or no? he answered, That he referred himself unto that which the Catholic Roman Church should determine thereof.

Ultimo die termini Hilarii, undecimo Jacobi Regis.

MY LORDS,

I BROUGHT before you the first sitting of this term the cause of duels; but now this last sitting I shall bring before you a cause concerning the greatest duel which is in the Christian world, the duel and conflict between the lawful authority of sovereign Kings, which is God's ordinance for the comfort of human society, and the swelling pride and usurpation of the see of Rome *in temporalibus*, tending altogether to anarchy and confusion. Wherein if this pretence in the Pope of Rome, by cartels to make sovereign princes as the banditti, and to proscribe their lives, and to expose their kingdoms to prey; if these pretences, I say, and all persons that submit themselves to that part of the Pope's power in the least degree, be not by all possible severity repressed and punished.

the state of Christian Kings will be no other than the ancient torment described by the poets in the hell of the heathen; a man sitting richly robed, solemnly attended, delicious fare, *&c.* with a sword hanging over his head, hanging by a small thread, ready every moment to be cut down by an accursing and accursed hand. Surely I had thought they had been the prerogatives of God alone, and of his secret judgments: *Solvam cingula regum, I will loosen the girdles of Kings;* or again, *He poureth contempt upon princes;* or, *I will give a King in my wrath, and take him away again in my displeasure;* and the like: but if these be the claims of a mortal man, certainly they are but the mysteries of that person which *exalts himself above all that is called God, supra omne quod dicitur Deus.* Note it well, not above God, though that in a sense be true, but *above all that is called God;* that is, lawful Kings and magistrates.

But, my lords, in this duel I find this Talbot, that is now before you, but a coward; for he hath given ground, he hath gone backward and forward; but in such a fashion, and with such interchange of repenting and relapsing, as I cannot tell whether it doth extenuate or aggravate his offence. If he shall more publicly in the face of the court fall and settle upon a right mind, I shall be glad of it; and he that would be against the King's mercy, I would he might need the King's mercy: but nevertheless the court will proceed by rules of justice.

The offence therefore wherewith I charge this Talbot, prisoner at the bar, is this in brief and in effect: That he hath maintained, and maintaineth under his hand, a power in the Pope for deposing and murdering of Kings. In what sort he doth this, when I come to the proper and particular charge, I will deliver it in his own words without pressing or straining.

But before I come to the particular charge of this man, I cannot proceed so coldly; but I must express unto your lordships the extreme and imminent danger wherein our dear and dread Sovereign is, and in him we all; nay, all Princes of both religions, for it is a

common cause, do stand at this day, by the spreading and inforcing of this furious and pernicious opinion of the pope's temporal power: which though the modest sort would blanch with the distinction of *in ordine ad spiritualia*, yet that is but an elusion; for he that maketh the distinction, will also make the case. This peril, though it be in itself notorious, yet because there is a kind of dulness, and almost a lethargy in this age, give me leave to set before you two glasses, such as certainly the like never met in one age; the glass of France, and the glass of England. In that of France the tragedies acted and executed in two immediate Kings; in the glass of England, the same, or more horrible, attempted likewise in a Queen and King immediate, but ending in a happy deliverance. In France, Henry III. in the face of his army, before the walls of Paris, stabbed by a wretched Jacobine frier. Henry IV. a prince that the French do surname the Great, one that had been a saviour and redeemer of his country from infinite calamities, and a restorer of that monarchy to the ancient state and splendor, and a prince almost heroical, except it be in the point of revolt from religion, at a time when he was as it were to mount on horseback for the commanding of the greatest forces that of long time had been levied in France, this King likewise stillettoed by a rascal votary, which had been enchanted and conjured for the purpose.

In England, Queen Elizabeth, of blessed memory, a Queen comparable and to be ranked with the greatest Kings, oftentimes attempted by like votaries, Sommervile, Parry, Savage, and others, but still protected by the watchman that slumbereth not. Again, our excellent sovereign King James, the sweetness and clemency of whose nature were enough to quench and mortify all malignity, and a King shielded and supported by posterity; yet this King in the chair of Majesty, his vine and olive branches about him, attended by his nobles and third estate in parliament; ready in the twinkling of an eye, as if it had been a particular dooms-day, to have been brought to ashes, dispersed

to the four winds. I noted the last day, my lord chief justice, when he spake of this powder treason, he laboured for words; though they came from him with great efficacy, yet he truly confessed, and so must all men, that that treason is above the charge and report of any words whatsoever.

Now, my lords, I cannot let pass, but in these glasses which I spake of, besides the facts themselves and danger, to shew you two things; the one, the ways of God Almighty, which turneth the sword of Rome upon the Kings that are the vassals of Rome, and over them gives it power; but protecteth those Kings which have not accepted the yoke of his tyranny, from the effects of his malice: the other, that, as I said at first, this is a common cause of Princes; it involveth Kings of both religions; and therefore his Majesty did most worthily and prudently ring out the alarm-bell, to awake all other Princes to think of it seriously, and in time. But this is a miserable case the while, that these Roman soldiers do either thrust the spear into the sides of God's anointed, or at least they crown them with thorns; that is, piercing and pricking cares and fears, that they can never be quiet or secure of their lives or states. And as this peril is common to Princes of both religions, so Princes of both religions have been likewise equally sensible of every injury that touched their temporals.

Thuanus reports in his story, that when the realm of France was interdicted by the violent proceedings of Pope Julius the second, the King, otherwise noted for a moderate Prince, caused coins of gold to be stamped with his own image, and this superscription, *Perdam nomen Babylonis e terra*. Of which Thuanus saith, himself had seen divers pieces thereof. So as this catholic King was so much incensed at that time, in respect of the Pope's usurpation, as he did apply Babylon to Rome. Charles the fifth, emperor, who was accounted one of the Pope's best sons, yet proceeded in matter temporal towards Pope Clement with strange rigour: never regarding the pontificality, but kept him prisoner thirteen months in a pestilent prison;

and was hardly dissuaded by his council from having sent him captive into Spain; and made sport with the threats of Frosberg the German, who wore a silk rope under his cassock, which he would shew in all companies; telling them that he carried it to strangle the Pope with his own hands. As for Philip the fair, it is the ordinary example, how he brought Pope Boniface the eighth to an ignominious end, dying mad and enraged; and how he stiled his rescript to the Pope's bull, whereby he challenged his temporals, *Sciat fatuitas vestra*, not your beatitude, but your stultitude; a stile worthy to be continued in the like cases; for certainly that claim is mere folly and fury. As for native examples, here it is too long a field to enter into them. Never Kings of any nation kept the partition-wall between temporal and spiritual better in times of greatest superstition: I report me to King Edward I. that set up so many crosses, and yet crossed that part of the Pope's jurisdiction, no man more strongly. But these things have passed better pens and speeches: here I end them.

But now to come to the particular charge of this man, I must inform your lordships the occasion and nature of this offence: There hath been published lately to the world a work of Suarez a Portuguese, a Professor in the university of Coimbra, a confident and daring writer, such an one as Tully describes in derision; *nihil tam verens, quam ne dubitare aliqua de re videretur:* one that fears nothing but this, lest he should seem to doubt of any thing. A fellow that thinks with his magistrality and goose-quill to give laws and menages to crowns and sceptres. In this man's writing this doctrine of deposing or murdering Kings seems to come to a higher elevation than heretofore; and it is more arted and positived than in others. For in the passages which your lordships shall hear read anon, I find three assertions which run not in the vulgar track, but are such as wherewith mens ears, as I suppose, are not much acquainted; whereof the first is, That the Pope hath a superiority over Kings, as subjects, to depose them; not only for spiritual crimes,

as heresy and schism, but for faults of a temporal nature; forasmuch as a tyrannical government tendeth ever to the destruction of souls. So by this position, Kings of either religion are alike comprehended, and none exempted. The second, that after a sentence given by the Pope, this writer hath defined of a series, or succession, or substitution of hangmen, or *bourreaux*, to be sure, lest an executioner should fail. For he saith, That when a King is sentenced by the Pope to deprivation or death, the executioner, who is first in place, is he to whom the Pope shall commit the authority, which may be a foreign prince, it may be a particular subject, it may be general, to the first undertaker. But if there be no direction or assignation in the sentence special nor general, then, *de jure*, it appertains to the next successor, a natural and pious opinion; for commonly they are sons, or brothers, or near of kin, all is one: so as the successor be apparent; and also that he be a catholic. But if he be doubtful, or that he be no catholic, then it devolves to the commonalty of the kingdom; so as he will be sure to have it done by one minister or other. The third is, he distinguisheth of two kinds of tyrants, a tyrant in title, and a tyrant in regiment; the tyrant in regiment cannot be resisted or killed without a sentence precedent by the Pope; but a tyrant in title may be killed by any private man whatsoever. By which doctrine he hath put the judgment of King's titles, which I will undertake are never so clean but that some vain quarrel or exception may be made unto them, upon the fancy of every private man; and also couples the judgment and execution together, that he may judge him by a blow, without any other sentence.

Your lordships see what monstrous opinions these are, and how both these beasts, the beast with seven heads, and the beast with many heads, Pope and people, are at once let in, and set upon the sacred persons of Kings.

Now to go on with the narrative; there was an extract made of certain sentences and portions of this book, being of this nature that I have set forth, by a

great prelate and counsellor, upon a just occasion; and there being some hollowness and hesitation in these matters, wherein it is a thing impious to doubt, discovered and perceived in Talbot; he was asked his opinion concerning these assertions, in the presence of the best; and afterwards they were delivered to him, that upon advice, and *sedato animo*, he might declare himself. Whereupon, under his hand, he subscribes thus;

May it please your honourable good lordships: Concerning this doctrine of Suarez, I do perceive, by what I have read in this book, that the same doth concern matter of faith, the controversy growing upon exposition of Scriptures and councils, wherein, being ignorant and not studied, I cannot take upon me to judge; but I do submit my opinion therein to the judgment of the catholic Roman church, as in all other points concerning faith I do. And for matter concerning my loyalty, I do acknowledge my Sovereign Liege Lord King James, to be lawful and undoubted King of all the kingdoms of England, Scotland, and Ireland; and I will bear true faith and allegiance to his Highness during my life.

WILLIAM TALBOT.

My lords, upon these words I conceive Talbot hath committed a great offence, and such a one, as if he had entered into a voluntary and malicious publication of the like writing, it would have been too great an offence for the capacity of this court. But because it grew by a question asked by a council of estate, and so rather seemeth, in a favourable construction, to proceed from a kind of submission to answer, than from any malicious or insolent will; it was fit, according to the clemency of these times, to proceed in this manner before your lordships: and yet let the hearers take these things right; for certainly, if a man be required by the council to deliver his opinion whether King James be King or no? and he deliver his opinion that he is not, this is high treason: but I do not say that

these words amount to that; and therefore let me open them truly to your lordships, and therein open also the understanding of the offender himself, how far they reach.

My lords, a man's allegiance must be independent and certain, and not dependent and conditional. Elizabeth Barton, that was called the holy maid of Kent, affirmed, that if King Henry VIII. did not take Catharine of Spain again to his wife within a twelvemonth, he should be no King: and this was treason. For though this act be contingent and future, yet the preparing of the treason is present.

And in like manner, if a man should voluntarily publish or maintain, that whensoever a bull of deprivation shall come forth against the King, that from thenceforth he is no longer King; this is of like nature. But with this I do not charge you neither; but this is the true latitude of your words, That if the doctrine touching the killing of Kings be matter of faith, then you submit yourself to the judgment of the catholic Roman church: so as now, to do you right, your allegiance doth not depend simply upon a sentence of the Pope's deprivation against the King; but upon another point also, if these doctrines be already, or shall be declared to be matter of faith. But, my lords, there is little won in this: there may be some difference to the guilt of the party, but there is little to the danger of the King. For the same Pope of Rome may, with the same breath, declare both. So as still, upon the matter, the King is made but tenant at will of his life and kingdoms; and the allegiance of his subjects is pinned upon the Pope's acts. And certainly, it is time to stop the current of this opinion of acknowledgment of the Pope's power *in temporalibus;* or else it will sap and supplant the seat of Kings. And let it not be mistaken, that Mr. Talbot's offence should be no more than the refusing the oath of allegiance. For it is one thing to be silent, and another thing to affirm. As for the point of matter of faith, or not of faith, to tell your lordships plain, it would astonish a man to see the gulf of this

implied belief. Is nothing excepted from it? If a man should ask Mr. Talbot, Whether he do condemn murder, or adultery, or rape, or the doctrine of Mahomet, or of Arius, instead of Suarez? Must the answer be with this exception, that if the question concern matter of faith, as no question it doth, for the moral law is matter of faith, that therein he will submit himself to what the church shall determine? And, no doubt, the murder of princes is more than simple murder. But to conclude, Talbot, I will do you this right, and I will not be reserved in this, but to declare that, that is true; that you came afterwards to a better mind; wherein if you had been constant, the King, out of his great goodness, was resolved not to have proceeded with you in course of justice; but then again you started aside like a broken bow. So that by your variety and vacillation you lost the acceptable time of the first grace, which was not to have convented you.

Nay, I will go farther with you: your last submission I conceive to be satisfactory and complete; but then it was too late, the King's honour was upon it; it was published and a day appointed for hearing; yet what preparation that may be to the second grace of pardon, that I know not: but I know my lords, out of their accustomed favour, will admit you not only to your defence concerning that that hath been charged; but to extenuate your fault by any submission that now God shall put into your mind to make.

THE

CHARGE

GIVEN BY

SIR FRANCIS BACON, KNIGHT,

HIS MAJESTY'S ATTORNEY GENERAL,

AGAINST

MR. OLIVER ST. JOHN,

FOR

Scandalizing and traducing in the Public Sessions, Letters sent from the Lords of the Council touching the Benevolence.

MY LORDS,

I SHALL inform you *ore tenus,* against this gentleman Mr. I. S. a gentleman, as it seems, of an ancient house and name; but, for the present, I can think of him by no other name, than the name of a great offender. The nature and quality of his offence, in sum, is this: This gentleman hath, upon advice, not suddenly by his pen, nor by the slip of his tongue; not privately, or in a corner, but publicly, as it were, to the face of the King's ministers and justices, slandered and traduced the King our sovereign, the law of the land, the parliament, and infinite particulars of his Majesty's worthy and loving subjects. Nay, the slander is of that nature, that it may seem to interest the people in grief and discontent against the state; whence might have ensued matter of murmur and sedition. So that it is not a simple slander, but a seditious slander, like to that the poet speaketh of—*Calamosque armare veneno.* A venomous dart that hath both iron and poison.

To open to your lordships the true state of this offence, I will set before you, first, the occasion where-

upon Mr. I. S. wrought: then the offence itself in his own words: and lastly, the points of his charge.

My lords, you may remember that there was the last parliament an expectation to have had the King supplied with treasure, although the event failed. Herein it is not fit for me to give opinion of an house of parliament, but I will give testimony of truth in all places. I served in the lower house, and I observed somewhat. This I do affirm, that I never could perceive but that there was in that house a general disposition to give, and to give largely. The clocks in the house perchance might differ; some went too fast, some went too slow; but the disposition to give was general: so that I think I may truly say, *solo tempore lapsus amor.*

This accident happening thus besides expectation, it stirred up and awaked in divers of his Majesty's worthy servants and subjects of the clergy, the nobility, the court, and others here near at hand, an affection loving and chearful, to present the King some with plate, some with money, as free-will offerings, a thing that God Almighty loves, a chearful giver: what an evil eye doth I know not. And, my lords, let me speak it plainly unto you: God forbid any body should be so wretched as to think that the obligation of love and duty, from the subject to the King, should be joint and not several. No, my lords, it is both. The subject petitioneth to the King in parliament. He petitioneth likewise out of parliament. The King on the other side gives graces to the subject in parliament: he gives them likewise, and poureth them upon his people out of parliament; and so no doubt the subject may give to the King in parliament, and out of parliament. It is true the parliament is *intercursus magnus*, the great intercourse and main current of graces and donatives from the King to the people, from the people to the King: but parliaments are held but at certain times; whereas the passages are always open for particulars; even as you see great rivers have their tides, but particular springs and fountains run continually.

To proceed therefore: As the occasion, which was the failing of supply by parliament, did awake the love and benevolence of those that were at hand to give; so it was apprehended and thought fit by my lords of the council to make a proof whether the occasion and example both, would not awake those in the country of the better sort to follow. Whereupon, their lordships devised and directed letters unto the sheriffs and justices, which declared what was done here above, and wished that the country might be moved, especially men of value.

Now, my lords, I beseech you give me favour and attention to set forth and observe unto you five points: I will number them, because other men may note them; and I will but touch them, because they shall not be drowned or lost in discourse, which I hold worthy the observation, for the honour of the state and confusion of slanderers; whereby it will appear most evidently what care was taken, that that which was then done might not have the effect, no nor the shew, no nor so much as the shadow of a tax; and that it was so far from breeding or bringing in any ill precedent or example, as contrariwise it is a corrective that doth correct and allay the harshness and danger of former examples.

The first is, that what was done was done immediately after such a parliament, as made general profession to give, and was interrupted by accident: so as you may truly and justly esteem it, *tanquam posthuma proles parliamenti*, as an after-child of the parliament, and in pursuit, in some small measure, of the firm intent of a parliament past. You may take it also, if you will, as an advance or provisional help until a future parliament; or as a gratification simply without any relation to a parliament; you can no ways take it amiss.

The second is, that it wrought upon example, as a thing not devised or projected, or required; no nor so much as recommended, until many that were never moved nor dealt with, *ex mero motu*, had freely and frankly sent in their presents. So that the letters were

rather like letters of news, what was done at London, than otherwise: and we know *exempla ducunt, non trahunt:* examples they do but lead, they do not draw nor drive.

The third is, that it was not done by commission under the great seal; a thing warranted by a multitude of precedents, both ancient, and of late time, as you shall hear anon, and no doubt warranted by law: so that the commissions be of that stile and tenour, as that they be to move and not to levy: but this was done by letters of the council, and no higher hand or form.

The fourth is, that these letters had no manner of shew of any binding act of state: for they contain not any special frame or direction how the business should be managed; but were written as upon trust, leaving the matter wholly to the industry and confidence of those in the country; so that it was an *absque computo;* such a form of letters as no man could fitly be called to account upon.

The fifth and last point is, that the whole carriage of the business had no circumstance compulsory. There was no proportion or rate set down, not so much as by way of a wish; there was no menace of any that should deny; no reproof of any that did deny; no certifying of the names of any that had denied. Indeed, if men could not content themselves to deny, but that they must censure and inveigh, nor to excuse themselves, but they must accuse the state, that is another case. But I say, for denying, no man was apprehended, no nor noted. So that I verily think, that there is none so subtle a disputer in the controversy of *liberum arbitrium,* that can with all his distinctions fasten or carp upon the act, but that there was free-will in it.

I conclude therefore, my lords, that this was a true and pure benevolence; not an imposition called a benevolence, which the statute speaks of; as you shall hear by one of my fellows. There is a great difference, I tell you, though Pilate would not see it, between *Rex Judæorum* and *se dicens Regem Judæorum.* And there is a great difference between a benevolence and an exaction called a benevolence, which the duke of

Buckingham speaks of in his oration to the city; and lefineth it to be not what the subject of his good-will ould give, but what the King of his good-will would ake. But this, I say, was a benevolence wherein very man had a prince's prerogative, a negative voice; nd this word, *excuse moy*, was a plea peremptory. And therefore I do wonder how Mr. I. S. could foul r trouble so clear a fountain; certainly it was but his wn bitterness and unsound humours.

Now to the particular charge: Amongst other ountries, these letters of the lords came to the justices f D---shire, who signified the contents thereof, and ave directions and appointments for meetings con-erning the business, to several towns and places within hat county: and amongst the rest, notice was given nto the town of A. The mayor of A conceiving that his Mr. I. S. being a principal person, and a dweller in hat town, was a man likely to give both money and good example, dealt with him to know his mind: he ntending, as it seems, to play prizes, would give no answer to the mayor in private, but would take time. The next day then being an appointment of the justices to meet, he takes occasion, or pretends occasion to be absent, because he would bring his papers upon the stage: and thereupon takes pen in hand, and instead of excusing himself, sits down and contriveth a sedi-tious and libellous accusation against the King and state, which your lordships shall now hear, and sends it to the mayor: and withal, because the feather of his quill might fly abroad, he gives authority to the mayor to impart it to the justices, if he so thought good. And now, my lords, because I will not mistake or mis-repeat, you shall hear the seditious libel in the proper terms and words thereof.

[Here the papers were read.]

My lords, I know this paper offends your ears much, nd the ears of any good subject; and sorry I am that he times should produce offences of this nature: but ince they do, I would be more sorry they should be passed without severe punishment: *Non tradite fac-*

tum, as the verse says, altered a little, *aut si tradatis, facti quoque tradite pœnam.* If any man have a mind to discourse of the fact, let him likewise discourse of the punishment of the fact.

In this writing, my lords, there appears a monster with four heads, of the progeny of him that is the father of lyes, and takes his name from slander.

The first is a wicked and seditious slander; or, if I shall use the Scripture phrase, a blaspheming of the King himself; setting him forth for a Prince perjured in the great and solemn oath of his coronation, which is as it were the knot of the diadem; a Prince that should be a violator and infringer of the liberties, laws, and customs of the kingdom; a mark for an Henry the Fourth; a match for a Richard the Second.

The second is a slander and falsification, and wresting of the law of the land gross and palpable: it is truly said by a civilian, *Tortura legum pessima*, the torture of laws is worse than the torture of men.

The third is a slander and false charge of the parliament, that they had denied to give to the King; a point of notorious untruth.

And the last is a slander and taunting of an infinite number of the King's loving subjects, that have given towards this benevolence and free contribution; charging them as accessary and co-adjutors to the King's perjury. Nay, you leave us not there, but you take upon you a pontifical habit, and couple your slander with a curse; but thanks be to God we have learned sufficiently out of the Scripture, that *as the bird flies away, so the causeless curse shall not come.*

For the first of these, which concerns the King, I have taken to myself the opening and aggravation thereof; the other three I have distributed to my fellows.

My lords, I cannot but enter into this part with some wonder and astonishment, how it should come into the heart of a subject of England to vapour forth such a wicked and venomous slander against the King, whose goodness and grace is comparable, if not incomparable, unto any of the Kings his progenitors.

This therefore gives me a just and necessary occasion to do two things: The one, to make some representation of his Majesty; such as truly he is found to be in his government, which Mr. I. S. chargeth with violation of laws and liberties: The other, to search and open the depth of Mr. I. S. his offence. Both which I will do briefly; because the one, I cannot express sufficiently; and the other, I will not press too far.

My lords, I mean to make no panegyric or laudative; the King delights not in it, neither am I fit for it: but if it were but a counsellor or nobleman, whose name had suffered, and were to receive some kind of reparation in this high court, I would do him that duty as not to pass his merits and just attributes, especially such as are limited with the present case, in silence: for it is fit to burn incense where evil odours have been cast and raised. Is it so that King James shall be said to be a violator of the liberties, laws, and customs of his kingdoms? Or is he not rather a noble and constant protector and conservator of them all? I conceive this consisteth in maintaining religion and the true Church; in maintaining the laws of the kingdom, which is the subject's birth-right; in temperate use of the prerogative; in due and free administration of justice, and conservation of the peace of the land.

For religion, we must ever acknowledge in the first place, that we have a King that is the principal conservator of true religion through the Christian world. He hath maintained it not only with sceptre and sword, but likewise by his pen; wherein also he is potent.

He hath awaked and re-authorized the whole party of the reformed religion throughout Europe; which through the insolency and divers artifices and inchantments of the adverse part, was grown a little dull and dejected: He hath summoned the fraternity of Kings to enfranchise themselves from the usurpation of the See of Rome: He hath made himself a mark of contradiction for it.

Neither can I omit, when I speak of religion, to remember that excellent act of his Majesty, which though it were done in a foreign country, yet the

Church of God is one, and the contagion of these things will soon pass seas and lands: I mean, in his constant and holy proceeding against the heretic Vorstius, whom, being ready to enter into the chair, and there to have authorized one of the most pestilent and heathenish heresies that ever was begun, his Majesty by his constant opposition dismounted and pulled down. And I am persuaded there sits in this court one whom God doth the rather bless for being his Majesty's instrument in that service.

I cannot remember religion and the Church, but I must think of the seed-plots of the same, which are the universities. His Majesty, as for learning amongst Kings, he is incomparable in his person; so likewise hath he been in his government a benign or benevolent planet towards learning: by whose influence those nurseries and gardens of learning, the universities, were never more in flower nor fruit.

For the maintaining of the laws, which is the hedge and fence about the liberty of the subject, I may truly affirm it was never in better repair. He doth concur with the votes of the nobles; *Nolumus leges Angliæ mutare.* He is an enemy of innovation. Neither doth the universality of his own knowledge carry him to neglect or pass over the very forms of the laws of the land. Neither was there ever King, I am persuaded, that did consult so oft with his judges, as my lords that sit here know well. The judges are a kind of council of the King's by oath and ancient institution; but he useth them so indeed: he confers regularly with them upon their returns from their visitations and circuits: he gives them liberty, both to inform him, and to debate matters with him; and in the fall and conclusion commonly relies on their opinions.

As for the use of the prerogative, it runs within the ancient channels and banks: some things that were conceived to be in some proclamations, commissions, and patents, as overflows, have been by his wisdom and care reduced; whereby, no doubt, the main channel of his prerogative is so much the stronger. For evermore overflows do hurt the channel.

As for administration of justice between party and party, I pray observe these points. There is no news of great seal or signet that flies abroad for countenance or delay of causes; protections rarely granted, and only upon great ground, or by consent. My lords here of the council and the King himself meddle not, as hath been used in former times, with matters of *meum* and *tuum*, except they have apparent mixture with matters of estate, but leave them to the King's courts of law or equity. And for mercy and grace, without which there is no standing before justice, we see, the King now hath reigned twelve years in his white robe, without almost any aspersion of the crimson dye of blood. There sits my lord Hobart, that served attorney seven years. I served with him. We were so happy, as there passed not through our hands any one arraignment for treason; and but one for any capital offence, which was that of the Lord Sanquhar; the noblest piece of justice, one of them, that ever came forth in any King's time.

As for penal laws, which lie as snares upon the subjects, and which were as a *nemo scit* to King Henry VII.; it yields a revenue that will scarce pay for the parchment of the King's records at Westminster.

And lastly for peace, we see manifestly his Majesty bears some resemblance of that great name, *a Prince of Peace:* he hath preserved his subjects during his reign in peace, both within and without. For the peace with states abroad, we have it *usque ad satietatem:* and for peace in the lawyers phrase, which count trespasses, and forces, and riots, to be *contra pacem;* let me give your lordships this token or taste, that this court, where they should appear, had never less to do. And certainly there is no better sign of *omnia bene*, than when this court is in a still.

But, my lords, this is a sea of matter: and therefore I must give it over, and conclude, that there was never King reigned in this nation that did better keep covenant in preserving the liberties and procuring the

good of his people: so that I must needs say for the subjects of England,

O fortunatos nimium sua si bona norint;

as no doubt they do both know and acknowledge it; whatsoever a few turbulent discoursers may, through the lenity of the time, take boldness to speak.

And as for this particular, touching the benevolence, wherein Mr. I. S. doth assign this breach of covenant, I leave it to others to tell you what the King may do, or what other Kings have done; but I have told you what our King and my lords have done: which, I say and say again, is so far from introducing a new precedent, as it doth rather correct, and mollify, and qualify former precedents.

Now, Mr. I. S. let me tell you your fault in few words: for that I am persuaded you see it already, though I woo no man's repentance; but I shall, as much as in me is, cherish it where I find it. Your offence hath three parts knit together:

Your slander,

Your menace, and

Your comparison.

For your slander, it is no less than that the King is perjured in his coronation oath. No greater offence than perjury; no greater oath than that of a coronation. I leave it; it is too great to aggravate.

Your menace, that if there were a Bullingbroke, or I cannot tell what, there were matter for him, is a very seditious passage. You know well, that howsoever Henry the Fourth's act, by a secret providence of God, prevailed, yet it was but an usurpation; and if it were possible for such a one to be this day, wherewith it seems your dreams are troubled, I do not doubt, his end would be upon the block; and that he would sooner have the ravens sit upon his head at London bridge, than the crown at Westminster. And it is not your interlacing of your "God forbid," that will salve these seditious speeches: neither could it be a forewarning, because the matter was past and not re-

vocable, but a very stirring up and incensing of the people. If I should say to you, for example, " If these " times were like some former times, of King Henry " VIII. or some other times, which God forbid, Mr. " I. S. it would cost you your life;" I am sure you would not think this to be a gentle warning, but rather that I incensed the court against you.

And for your comparison with Richard II. I see, you follow the example of them that brought him upon the stage, and into print, in Queen Elizabeth's time, a most prudent and admirable Queen. But let me intreat you, that when you will speak of Queen Elizabeth or King James, you would compare them to King Henry VII. or King Edward I. or some other parallels to which they are alike. And this I would wish both you and all to take heed of, how you speak seditious matter in parables, or by tropes or examples. There is a thing in an indictment called an inuendo; you must beware how you beckon or make signs upon the King in a dangerous sense: but I will contain myself and press this no farther. I may hold you for turbulent or presumptuous; but I hope you are not disloyal: you are graciously and mercifully dealt with. And therefore having now opened to my lords, and, as I think, to your own heart and conscience, the principal part of your offence, which concerns the King, I leave the rest, which concerns the law, parliament, and the subjects that have given, to Mr. Serjeant and Mr. Solicitor.

THE

CHARGE

OF

O W E N,

INDICTED OF HIGH TREASON, IN THE KING'S BENCH.

BY

SIR FRANCIS BACON, KNIGHT,

HIS MAJESTY'S ATTORNEY GENERAL.

THE treason wherewith this man standeth charged, is for the kind and nature of it ancient, as ancient as there is any law of England; but in the particular, late and upstart: and again, in the manner and boldness of the present case, new and almost unheard of till this man. Of what mind he is now, I know not; but I take him as he was, and as he standeth charged. For high treason is not written in ice; that when the body relenteth, the impression should go away.

In this cause the evidence itself will spend little time: time therefore will be best spent in opening fully the nature of this treason, with the circumstances thereof; because the example is more than the man. I think good therefore by way of inducement and declaration in this cause to open unto the court, jury and hearers, five things.

The first is the clemency of the King; because it is news, and a kind of rarity to have a proceeding in this place upon treason: and perhaps it may be marvelled by some, why after so long an intermission it should light upon this fellow; being a person but contemptible, a kind of venomous fly, and a hang-by of the seminaries.

The second is, the nature of this treason, as concerning the fact, which, of all kinds of compassing the

King's death, I hold to be the most perilous, and as much differing from other conspiracies, as the lifting up of a thousand hands against the King, like the giant Briareus, differs from lifting up one or a few hands.

The third point that I will speak unto is the doctrine or opinion, which is the ground of this treason; wherein I will not argue or speak like a divine or scholar, but as a man bred in a civil life; and to speak plainly, I hold the opinion to be such that deserveth rather detestation than contestation.

The fourth point is the degree of this man's offence, which is more presumptuous than I have known any other to have fallen into in this kind, and hath a greater overflow of malice and treason.

And fifthly, I will remove somewhat that may seem to qualify and extenuate this man's offence; in that he hath not affirmed simply that it is lawful to kill the King, but conditionally; that if the King be excommunicate, it is lawful to kill him: which maketh little difference either in law or peril.

For the King's clemency, I have said it of late upon a good occasion, and I still speak it with comfort: I have now served his Majesty's solicitor and attorney eight years and better; yet this is the first time that ever I gave in evidence against a traitor at this bar or any other. There hath not wanted matter in that party of the subjects whence this kind of offence floweth, to irritate the King: he hath been irritated by the powder of treason, which might have turned judgment into fury. He hath been irritated by wicked and monstrous libels; irritated by a general insolency and presumption in the Papists throughout the land; and yet I see his Majesty keepeth Cæsar's rule: *Nil malo, quam eos esse similes sui, et me mei.* He leaveth them to be like themselves; and he remaineth like himself, and striveth to overcome evil with goodness. A strange thing, bloody opinions, bloody doctrines, bloody examples, and yet the government still unstained with blood. As for this Owen that is brought in question, though his person be in his condition contemptible; yet we see by miserable examples, that these wretches

which are but the scum of the earth, have been able to stir earthquakes by murdering princes; and if it were in case of contagion, as this is a contagion of the heart and soul, a rascal may bring in a plague into the city as well as a great man: so it is not the person, but the matter that is to be considered.

For the treason itself, which is the second point, my desire is to open it in the depth thereof, if it were possible; but it is bottomless: I said in the beginning, that this treason in the nature of it was old. It is not of the treasons whereof it may be said, from the beginning it was not so. You are indicted, Owen, not upon any statute made against the Pope's supremacy, or other matters, that have reference to religion; but merely upon that law which was born with the kingdom, and was law even in superstitious times, when the Pope was received. The compassing and imagining of the King's death was treason. The statute of 25 Edw. III. which was but declaratory, begins with this article as the capital of capitals in treason, and of all others the most odious and the most perilous: and so the civil law saith, *Conjurationes omnium proditionum odiosissimæ et perniciosissimæ.* Against hostile invasions and the adherence of subjects to enemies, Kings can arm. Rebellions must go over the bodies of many good subjects before they can hurt the King: but conspiracies against the persons of Kings are like thunderbolts that strike upon the sudden, hardly to be avoided. *Major metus a singulis,* saith he, *quam ab universis.* There is no preparation against them: and that preparation which may be of guard or custody, is a perpetual misery. And therefore they that have written of the privileges of ambassadors and of the amplitude of safe-conducts, have defined, that if an ambassador or a man that cometh in upon the highest safe-conducts, do practise matter of sedition in a state, yet by the law of nations he ought to be remanded; but if he conspire against the life of a prince by violence or poison, he is to be justiced: *Quia odium est omni privilegio majus.* Nay, even amongst enemies, and in the most deadly wars, yet nevertheless conspiracy and assassi-

nation of princes hath been accounted villainous and execrable.

The manners of conspiring and compassing the King's death are many: but it is most apparent, that amongst all the rest this surmounteth. First, because it is grounded upon pretenced religion; which is a trumpet that inflameth the heart and powers of a man with daring and resolution more than any thing else. Secondly, it is the hardest to be avoided; for when a particular conspiracy is plotted or attempted against a King by some one or some few conspirators, it meets with a number of impediments. Commonly he that hath the head to devise it, hath not the heart to undertake it: and the person that is used, sometimes faileth in courage; sometimes faileth in opportunity; sometimes is touched with remorse. But to publish and maintain, that it may be lawful for any man living to attempt the life of a King, this doctrine is a venomous sop; or, as a legion of malign spirits, or an universal temptation, doth enter at once into the hearts of all that are any way prepared, or of any predisposition to be traitors; so that whatsoever faileth in any one, is supplied in many. If one man faint, another will dare: if one man hath not the opportunity, another hath; if one man relent, another will be desperate. And thirdly, particular conspiracies have their periods of time, within which if they be not taken, they vanish; but this is endless, and importeth perpetuity of springing conspiracies. And so much concerning the nature of the fact.

For the third point, which is the doctrine; that upon an excommunication of the Pope, with sentence of deposing, a King by any son of Adam may be slaughtered; and that it is justice and no murder; and that their subjects are absolved of their allegiance, and the Kings themselves exposed to spoil and prey. I said before, that I would not argue the subtlety of the question: it is rather to be spoken to by way of accusation of the opinion as impious, than by way of dispute of it as doubtful. Nay, I say, it deserveth rather some holy war or league amongst all Christian princes

of either religion for the extirpating and rasing of the opinion, and the authors thereof, from the face of the earth, than the stile of pen or speech. Therefore in this kind I will speak to it a few words, and not otherwise. Nay, I protest, if I were a Papist I should say as much: nay, I should speak it perhaps with more indignation and feeling. For this horrible opinion is our advantage, and it is their reproach, and will be their ruin.

This monster of opinion is to be accused of three most evident and most miserable slanders.

First, Of the slander it bringeth to the Christian faith, being a plain plantation of irreligion and atheism.

Secondly, The subversion which it introduceth into all policy and government.

Thirdly, The great calamity it bringeth upon Papists themselves; of which the more moderate sort, as men misled, are to be pitied.

For the first, if a man doth visit the foul and polluted opinions, customs, or practices of heathenism, Mahometism, and heresy, he shall find they do not attain to this height. Take the examples of damnable memory amongst the Heathens. The proscriptions in Rome of Sylla, and afterwards of the Triumvirs, what were they? They were but of a finite number of persons, and those not many that were exposed unto any man's sword. But what is that to the proscribing of a King, and all that shall take his part? And what was the reward of a soldier that amongst them killed one of the proscribed? A small piece of money. But what is now the reward of one that shall kill a King? The kingdom of heaven. The custom among the Heathen that was most scandalised was, that sometimes the priest sacrificed men; but yet you shall not read of any priesthood that sacrificed Kings.

The Mahometans make it a part of their religion to propagate their sect by the sword; but yet still by honourable wars, never by villanies and secret murders. Nay, I find that the Saracen prince, of whom the name of the assassins is derived, which had divers votaries at commandment, which he sent and employed

to the killing of divers princes in the east, by one of whom Amurath the first was slain, and Edward the first of England was wounded, was put down and rooted out by common consent of the Mahometan princes.

The Anabaptists, it is true, come nearest. For they profess the pulling down of magistrates: and they can chaunt the psalm, *To bind their Kings in chains, and their nobles in fetters of iron.* This is the glory of the saints, much like the temporal authority that the Pope challengeth over princes. But this is the difference, that that is a furious and fanatical fury, and this is a sad and solemn mischief: he *imagineth mischief as a law;* a law-like mischief.

As for the defence which they do make, it doth aggravate the sin, and turneth it from a cruelty towards man to a blasphemy towards God. For to say that all this is *in ordine ad spirituale,* and to a good end, and for the salvation of souls, it is directly to make God author of evil, and to draw him in the likeness of the prince of darkness; and to say with those that Saint Paul speaketh of, *Let us do evil that good may come thereof;* of whom the apostle saith definitively, *that their damnation is just.*

For the destroying of government universally, it is most evident, that it is not the case of protestant princes only, but of catholic princes likewise; as the King hath excellently set forth. Nay, it is not the case of princes only, but of all subjects and private persons. For touching princes, let history be perused, what hath been the causes of excommunication; and namely, this tumour of it, the deposing of Kings; it hath not been for heresy and schism alone, but for collation and investitures of bishopricks and benefices, intruding upon ecclesiastical possessions, violating of any ecclesiastical person or liberty. Nay, generally they maintain it, that it may be for any sin: so that the difference wherein their doctors vary, that some hold that the Pope hath his temporal power immediately, and others but *in ordine ad spirituale,* is but a delusion and an abuse. For all cometh to one. What is there that may not be made spiritual by con-

sequence: especially when he that giveth the sentence may make the case? and accordingly hath the miserable experience followed. For this murdering of Kings hath been put in practice, as well against papist Kings as protestant: save that it hath pleased God so to guide it by his admirable providence, as the attempts upon papist princes have been executed, and the attempts upon protestant princes have failed, except that of the Prince of Orange: and not that neither, until such time as he had joined too fast with the Duke of Anjou and the papists. As for subjects, I see not, nor ever could discern, but that by infallible consequence it is the case of all subjects and people, as well as of Kings; for it is all one reason, that a bishop, upon an excommunication of a private man, may give his lands and goods in spoil, or cause him to be slaughtered, as for the Pope to do it towards a King; and for a bishop to absolve the son from duty to the father, as for the Pope to absolve the subject from his allegiance to his King. And this is not my inference, but the very affirmative of Pope Urban the second, who in a brief to Godfrey, bishop of Luca, hath these very words, which cardinal Baronius reciteth in his Annals,

Tom. XI. p. 802. *Non illos homicidas arbitramur, qui adversus excommunicatos zelo catholicæ matris ardentes eorum quoslibet trucidare contigerit*, speaking generally of all excommunications.

THE

CHARGE

OF

SIR FRANCIS BACON, KNIGHT,

THE KING'S ATTORNEY-GENERAL,

AGAINST

MR. LUMSDEN, SIR JOHN WENTWORTH, AND SIR JOHN HOLLES.

For Scandal and traducing of the King's Justice in the proceedings against WESTON in the Star-Chamber, 10 November, 1615.

THE offence wherewith I shall charge the three offenders at the bar, is a misdemeanor of a high nature, tending to the defacing and scandal of justice in a great cause capital. The particular charge is this:

The King amongst many his princely virtues is known to excel in that proper virtue of the imperial throne, which is justice. It is a royal virtue, which doth employ the other three cardinal virtues in her service: wisdom to discover, and discern nocent or innocent; fortitude to prosecute and execute; temperance, so to carry justice as it be not passionate in the pursuit, nor confused in involving persons upon light suspicion, nor precipitate in time. For this his Majesty's virtue of justice God hath of late raised an occasion, and erected as it were a stage or theatre, much to his honour, for him to shew it, and act it in the pursuit of the untimely death of Sir Thomas Overbury, and therein cleansing the land from blood. For, my lords, if blood spilt pure doth cry to heaven in God's ears, much more blood defiled with poison.

This great work of his Majesty's justice, the more excellent it is, your lordships will soon conclude the greater is the offence of any that have sought to affront it or traduce it. And therefore, before I descend unto the charge of these offenders, I will set before your

lordships the weight of that which they have sought to impeach; speaking somewhat of the general crime of impoisonment, and then of the particular circumstances of this fact upon Overbury; and thirdly and chiefly, of the King's great and worthy care and carriage in this business.

The offence of impoisonment is most truly figured in that device or description, which was made of the nature of one of the Roman tyrants, that he was *lutum sanguine maceratum*, mire mingled or cemented with blood: for as it is one of the highest offences in guiltiness, so it is the basest of all others in the mind of the offenders. Treasons *magnum aliquid spectant:* they aim at great things; but this is vile and base. I tell your lordships what I have noted, that in all God's book, both of the Old and New Testament, I find examples of all other offences and offenders in the world, but not any one of an impoisonment or an impoisoner. I find mention of fear of casual impoisonment: when the wild vine was shred into the pot, they came complaining in a fearful manner; Master, *mors in olla.* And I find mention of poisons of beasts and serpents; *the poison of asps is under their lips.* But I find no example in the book of God of impoisonment. I have sometime thought of the words in the psalm, *let their table be made a snare.* Which certainly is most true of impoisonment; for the table, the daily bread, for which we pray, is turned to a deadly snare: but I think rather that that was meant of the treachery of friends that were participant of the same table.

But let us go on. It is an offence, my lords, that hath the two spurs of offending; *spes perficiendi,* and *spes celandi:* it is easily committed, and easily concealed.

It is an offence that is *tanquam sagitta nocte volans;* it is the arrow that flies by night. It discerns not whom it hits: for many times the poison is laid for one, and the other takes it; as in Sanders's case, where the poisoned apple was laid for the mother, and was taken up by the child, and killed the child:

and so in that notorious case, whereupon the statute of 22 Hen. VIII. cap. 9. was made, where the intent being to poison but one or two, poison was put into a little vessel of barm that stood in the kitchen of the bishop of Rochester's house; of which barm pottage or gruel was made, wherewith seventeen of the bishop's family were poisoned: nay, divers of the poor that came to the bishop's gate, and had the broken pottage in alms, were likewise poisoned. And therefore if any man will comfort himself, or think with himself, Here is great talk of impoisonment, I hope I am safe; for I have no enemies; nor I have nothing that any body should long for: Why, that is all one; for he may sit at table by one for whom poison is prepared, and have a drench of his cup, or of his pottage.

And so, as the poet saith, *concidit infelix alieno vulnere;* he may die another man's death. And therefore it was most gravely, and judiciously, and properly provided by that statute, that impoisonment should be high treason; because whatsoever offence tendeth to the utter subversion and dissolution of human society, is in the nature of high treason.

Lastly, it is an offence that I may truly say of it, *non est nostri generis, nec sanguinis.* It is, thanks be to God, rare in the isle of Britain: it is neither of our country, nor of our Church; you may find it in Rome or Italy. There is a region, or perhaps a religion for it: and if it should come amongst us, certainly it were better living in a wilderness than in a court.

For the particular fact upon Overbury. First, for the person of Sir Thomas Overbury: I knew the gentleman. It is true, his mind was great, but it moved not in any good order; yet certainly it did commonly fly at good things; and the greatest fault that I ever heard of him was, that he made his friend his idol. But I leave him as Sir Thomas Overbury.

But take him as he was the King's prisoner in the Tower; and then see how the case stands. In that place the state is as it were respondent to make good the body of a prisoner. And if any thing happen to him there, it may, though not in this case, yet in some

others, make an aspersion and reflection upon the state itself. For the person is utterly out of his own defence; his own care and providence can serve him nothing. He is in custody and preservation of law; and we have a maxim in our law, as my lords the judges know, that when a state is in preservation of law, nothing can destroy it, or hurt it. And God forbid but the like should be for the persons of those that are in custody of law; and therefore this was a circumstance of great aggravation.

Lastly, To have a man chased to death in such manner, as it appears now by matter of record; for other privacy of the cause I know not, by poison after poison, first roseaker, then arsenick, then mercury sublimate, then sublimate again; it is a thing would astonish man's nature to hear it. The poets feign, that the Furies had whips, that they were corded with poisonous snakes; and a man would think that this were the very case, to have a man tied to a post, and to scourge him to death with snakes: for so may truly be termed diversity of poisons.

Now I will come to that which is the principal; that is, his Majesty's princely, yea, and as I may truly term it, sacred proceeding in this cause. Wherein I will first speak of the temper of his justice, and then of the strength thereof.

First, it pleased my lord Chief Justice to let me know, that which I heard with great comfort, which was the charge that his Majesty gave to himself first, and afterwards to the commissioners in this case, worthy certainly to be written in letters of gold, wherein his Majesty did forerank and make it his prime direction, that it should be carried, without touch to any that was innocent; nay more, not only without impeachment, but without aspersion: which was a most noble and princely caution from his Majesty; for mens reputations are tender things, and ought to be, like Christ's coat, without seam. And it was the more to be respected in this case, because it met with two great persons; a nobleman that his Majesty had favoured and advanced, and his lady

being of a great and honourable house: though I think it be true that the writers say, That there is no pomegranate so fair or so sound, but may have a perished kernel. Nay, I see plainly, that in those excellent papers of his Majesty's own hand-writing, being as so many beams of justice issuing from that virtue which doth shine in him; I say, I see it was so evenly carried without prejudice, whether it were a true accusation of the one part, or a practice of a false accusation on the other, as shewed plainly that his Majesty's judgment was *tanquam tabula rasa*, as a clean pair of tables, and his ear *tanquam janua aperta*, as a gate not side open, but wide open to truth, as it should be by little and little discovered. Nay, I see plainly, that at the first, till farther light did break forth, his Majesty was little moved with the first tale, which he vouchsafeth not so much as the name of a tale; but calleth it a rumour, which is an heedless tale.

As for the strength or resolution of his Majesty's justice, I must tell your lordships plainly; I do not marvel to see Kings thunder out justice in cases of treason, when they are touched themselves; and that they are *vindices doloris proprii:* but that a King should, *pro amore justitiæ* only, contrary to the tide of his own affection, for the preservation of his people, take such care of a cause of justice, that is rare and worthy to be celebrated far and near. For, I think, I may truly affirm, that there was never in this kingdom, nor in any other kingdom, the blood of a private gentleman vindicated *cum tanto motu regni*, or to say better, *cum tanto plausu regni.* If it had concerned the King or prince, there could not have been greater nor better commissioners to examine it. The term hath been almost turned into a *justitium*, or vacancy; the people themselves being more willing to be lookers on in this business, than to follow their own. There hath been no care of discovery omitted, no moment of time lost. And therefore I will conclude this part with the saying of Solomon, *Gloria Dei celare rem, et gloria Regis scrutari rem.*

And his Majesty's honour is much the greater for that he hath shewed to the world in this business as it hath relation to my lord of Somerset, whose case in no sort I do prejudge, being ignorant of the secrets of the cause, but taking him as the law takes him hitherto, for a subject, I say, the King hath to his great honour shewed, that were any man, in such a case of blood, as the signet upon his right hand, as the Scripture says, yet would he put him off.

Now will I come to the particular charge of these gentlemen, whose qualities and persons I respect and love; for they are all my particular friends: but now I can only do this duty of a friend to them, to make them know their fault to the full.

And therefore, first, I will by way of narrative declare to your lordships the fact, with the occasion of it; then you shall have their confessions read, upon which you are to proceed, together with some collateral testimonies by way of aggravation: and lastly, I will note and observe to your lordships the material points which I do insist upon for their charge, and so leave them to their answer. And this I will do very briefly, for the case is not perplexed.

That wretched man Weston, who was the actor or mechanical party in this impoisonment, at the first day being indicted by a very substantial jury of selected citizens, to the number of nineteen, who found *billa vera*, yet nevertheless at the first stood mute: but after some days intermission, it pleased God to cast out the dumb devil, and that he did put himself upon his trial; and was by a jury also of great value, upon his confession, and other testimonies, found guilty: so as thirty-one sufficient jurors have passed upon him. Whereupon judgment and execution was awarded against him. After this, being in preparation for another world, he sent for Sir Thomas Overbury's father, and falling down upon his knees, with great remorse and compunction, asked him forgiveness. Afterwards, again, of his own motion, desired to have his like prayer of forgiveness recommended to his mother, who was absent. And at both times, out of the abundance of his heart, confessed that he was to die justly, and that

he was worthy of death. And after again at his execution, which is a kind of sealing-time of confessions, even at the point of death, although there were tempters about him, as you shall hear by and by, yet he did again confirm publickly, that his examinations were true, and that he had been justly and honourably dealt with. Here is the narrative, which induceth the charge. The charge itself is this.

Mr. L. whose offence stands alone single, the offence of the other two being in consort; and yet all three meeting in their end and centre, which was to interrupt or deface this excellent piece of justice; Mr. L. I say, mean while between Weston's standing mute and his trial, takes upon him to make a most false, odious, and libellous relation, containing as many untruths as lines, and sets it down in writing with his own hand, and delivers it to Mr. Henry Gibb, of the bed-chamber, to be put into the King's hand; in which writing he doth falsify and pervert all that was done the first day at the arraignment of Weston; turning the pike and point of his imputations principally upon my lord chief justice of England; whose name, thus occurring, I cannot pass by, and yet I cannot skill to flatter. But this I will say of him, and I would say as much to ages, if I should write a story; that never man's person and his place were better met in a business, than my lord Coke and my lord Chief Justice, in the cause of Overbury.

Now, my lords, in this offence of M. L. for the particulars of these slanderous articles, I will observe them unto you when the writings and examinations are read; for I do not love to set the gloss before the text. But, in general I note to your lordships, first, the person of M. L. I know he is a Scotch gentleman, and thereby more ignorant of our laws and forms; but I cannot tell whether this doth extenuate his fault in respect of ignorance, or aggravate it much, in respect of presumption; that he would meddle in that that he understood not: but I doubt it came not out of his quiver: some other man's cunning wrought upon this man's boldness. Secondly, I may note unto

you the greatness of the cause, wherein he being a private mean gentleman did presume to deal. M. L. could not but know to what great and grave commissioners the King had committed this cause; and that his Majesty in his wisdom would expect return of all things from them to whose trust he had committed this business. For it is the part of commissioners, as well to report the business, as to manage the business; and then his Majesty might have been sure to have had all things well weighed, and truly informed: and therefore it should have been far from M. L. to have presumed to have put forth his hand to so high and tender a business, which was not to be touched but by employed hands. Thirdly, I note to your lordships, that this infusion of a slander into a King's ear, is of all forms of libels and slanders the worst. It is true, that Kings may keep secret their informations, and then no man ought to enquire after them, while they are shrined in their breast. But where a King is pleased that a man shall answer for his false information; there, I say, the false information to a King exceeds in offence the false information of any other kind; being a kind, since we are in matter of poison, of impoisonment of a King's ear. And thus much for the offence of M. L.

For the offence of S. W. and H. I. which I said was in consort, it was shortly this. At the time and place of the execution of Weston, to supplant his Christian resolution, and to scandalize the justice already past, and perhaps to cut off the thread of that which is to come, these gentlemen, with others, came mounted on horseback, and in a ruffling and facing manner put themselves forward to re-examine Weston upon questions: and what questions? Directly cross to that that had been tried and judged. For what was the point tried? That Weston had poisoned Overbury. What was S. W.'s question? Whether Weston did poison Overbury or no? A contradictory directly: Weston answered only, that he did him wrong; and turning to the sheriff, said, You promised me I should not be troubled at this time. Never-

theless, he pressed him to answer; saying he desired to know it, that he might pray with him. I know not that S. W. is an ecclesiastic, that he should cut any man from the communion of prayer. And yet for all this vexing of the spirit of a poor man, now in the gates of death; Weston nevertheless stood constant, and said, I die not unworthily; my lord Chief Justice hath my mind under my hand, and he is an honourable and just judge. This is S. W. his offence.

For H. I. he was not so much a questionist; but wrought upon the others questions, and, like a kind of confessor, wished him to discharge his conscience, and to satisfy the world. What world? I marvel! it was sure the world at Tyburn. For the world at Guildhall, and the world at London, was satisfied before; *teste* the bells that rung. But men have got a fashion now-a-days, that two or three busy-bodies will take upon them the name of the world, and broach their own conceits, as if it were a general opinion. Well, what more? When they could not work upon Weston, then H. I. in an indignation turned about his horse, when the other was turning over the ladder, and said, he was sorry for such a conclusion; that was, to have the state honoured or justified; but others took and reported his words in another degree: but that I leave, seeing it is not confessed.

H. I. his offence had another appendix, before this in time; which was, that at the day of the verdict given up by the jury, he also would needs give his verdict, saying openly, that if he were of the jury, he would doubt what to do. Marry, he saith, he cannot tell well whether he spake this before the jury had given up the verdict, or after; wherein there is little gained. For whether H. I. were a pre-juror or a post-juror, the one was to prejudge the jury, the other as to taint them.

Of the offence of these two gentlemen in general, your lordships must give me leave to say, that it is an offence greater and more dangerous than is conceived. I know well that as we have no Spanish inquisitions, nor justice in a corner; so we have no gagging of mens

mouths at their death: but that they may speak freely at the last hour; but then it must come from the free motion of the party, not by temptation of questions. The questions that are to be asked ought to tend to farther revealing of their own or others guiltiness; but to use a question in the nature of a false interrogatory, to falsify that which is *res judicata*, is intolerable. For that were to erect a court or commission of review at Tyburn, against the King's Bench at Westminster. And besides, it is a thing vain and idle: for if they answer according to the judgment past, it adds no credit; or if it be contrary, it derogateth nothing: but yet it subjecteth the majesty of justice to popular and vulgar talk and opinion.

My lords, these are great and dangerous offences; for if we do not maintain justice, justice will not maintain us.

But now your lordships shall hear the examinations themselves, upon which I shall have occasion to note some particular things, *etc.*

THE

CHARGE

OF

SIR FRANCIS BACON, KNIGHT,

HIS MAJESTY'S ATTORNEY-GENERAL,

AGAINST

FRANCES COUNTESS OF SOMERSET,

Intended to have been spoken by him at her arraignment, on Friday, May 24, 1616, in case she had pleaded not guilty*.

It may please your grace, my Lord High Steward of England†, and you my lords the peers:

YOU have heard the indictment against this lady well opened; and likewise the point in law, that might make some doubt, declared and solved; wherein certainly the policy of the law of England is much to be esteemed, which requireth and respecteth form in the indictment, and substance in the proof.

This scruple it may be hath moved this lady to plead not guilty, though for the proof I shall not need much more than her own confession, which she hath formerly made, free and voluntary, and therein given glory to God and Justice. And certainly confession, as it is the strongest foundation of justice, so it is a kind of corner-stone, whereupon justice and mercy may meet.

The proofs, which I shall read in the end for the ground of your verdict and sentence, will be very short; and, as much as may, serve to satisfy your honours and consciences for the conviction of this lady, without wasting of time in a case clear and confessed; or ripping up guiltiness against one, that hath prostrated herself by confession; or preventing or de-

* She pleaded guilty, on which occasion the Attorney-General spoke a charge somewhat different from this.

† Thomas Egerton, Viscount Ellesmere, Lord High Chancellor.

flowering too much of the evidence. And therefore the occasion itself doth admonish me to spend this day rather in declaration than in evidence, giving God and the King the honour, and your lordships and the hearers the contentment, to set before you the proceeding of this excellent work of the King's justice, from the beginning to the end; and so to conclude with the reading the confessions and proofs.

My lords, this is now the second time * within the space of thirteen years reign of our happy Sovereign, that this high tribunal-seat of justice, ordained for the trial by peers, hath been opened and erected; and that, with a rare event, supplied and exercised by one and the same person, which is a great honour to you, my Lord Steward.

In all this mean time the King hath reigned in his white robe, not sprinkled with any drop of blood of any of his nobles of this kingdom. Nay, such have been the depths of his mercy, as even those noblemens bloods, against whom the proceeding was at Winchester, Cobham and Grey, were attainted and corrupted, but not spilt or taken away; but that they remained rather spectacles of justice in their continual imprisonment, than monuments of justice in the memory of their suffering.

It is true, that the objects of his justice then and now were very differing. For then, it was the revenge of an offence against his own person and crown, and upon persons that were malcontents, and contraries to the state and government. But now, it is the revenge of the blood and death of a particular subject, and the cry of a prisoner. It is upon persons that were highly in his favour; whereby his Majesty, to his great honour, hath shewed to the world, as if it were written in a sun-beam, that he is truly the lieutenant of Him, with whom there is no respect of persons; that his affections royal are above his affections private: that his favours and nearness about him are not

* The first time was on the trials of the lords Cobham and Grey, in November, 1603.

like popish sanctuaries to privilege malefactors: and that his being the best master of the world doth not let him from being the best King of the world. His people, on the other side, may say to themselves, *I will lie down in peace; for God and the King and the law protect me against great and small.* It may be a discipline also to great men, especially such as are swoln in fortunes from small beginnings, that the King is as well able to level mountains, as to fill valleys, if such be their desert.

But to come to the present case; the great frame of justice, my lords, in this present action, hath a vault, and it hath a stage: a vault, wherein these works of darkness were contrived; and a stage with steps, by which they were brought to light. And therefore I will bring this work of justice to the period of this day; and then go on with this day's work.

Sir Thomas Overbury was murdered by poison in the 15th of September, 1613, 11 *Reg.* This foul and cruel murder did, for a time, cry secretly in the ears of God; but God gave no answer to it, otherwise than by that voice, which sometimes he useth, which is *vox populi*, the speech of the people. For there went then a murmur, that Overbury was poisoned: and yet this same submiss and soft voice of God, the speech of the vulgar people, was not without a counter-tenor, or counter-blast of the devil, who is the common author both of murder and slander: for it was given out, that Overbury was dead of a foul disease, and his body, which they had made a *corpus Judaicum* with their poisons, so as it had no whole part, must be said to be leprosed with vice, and so his name poisoned as well as his body. For as to dissoluteness, I never heard the gentleman noted with it: his faults were insolency and turbulency, and the like of that kind: the other part of the soul, not the voluptuous.

Mean time, there was some industry used, of which I will not now speak, to lull asleep those that were the revengers of blood; the father and the brother of the murdered. And in these terms things stood by the space almost of two years, during which time God so

blinded the two great procurers, and dazzled them with their own greatness, and did bind and nail fast the actors and instruments with security upon their protection, as neither the one looked about them, nor the other stirred or fled, nor were conveyed away; but remaineth here still, as under a privy arrest of God's judgments; insomuch as Franklin, that should have been sent over to the Palsgrave with good store of money, was, by God's providence and the accident of a marriage of his, diverted and stayed.

But about the beginning of the progress last summer, God's judgments began to come out of their depths: and as the revealing of murders is commonly such, as a man may say, *a Domino hoc factum est;* it is God's work, and it is marvellous in our eyes: so in this particular it is most admirable; for it came forth by a compliment and matter of courtesy.

My lord of Shrewsbury *, that is now with God, recommended to a counsellor of state, of especial trust by his place, the late lieutenant Helwisse †, only for acquaintance as an honest worthy gentleman; and desired him to know him, and to be acquainted with him. That counsellor answered him civilly, that my lord did him a favour; and that he should embrace it willingly: but he must let his lordship know, that there did lie a heavy imputation upon that gentleman, Helwisse; for that Sir Thomas Overbury, his prisoner,

* Gilbert earl of Shrewsbury, knight of the Garter, who died May 8, 1616.

† Sir Gervase Helwisse, appointed lieutenant of the Tower, upon the removal of Sir William Waade on the 6th of May, 1613, [*Reliquiæ Wottonianæ*, p. 412, 3d Edit. 1672.] Mr. Chamberlain, in a MS. letter to Sir Dudley Carleton, dated at London, May 13, 1613, speaks of Sir Gervase's promotion in these terms. "One "Sir Gervase Helwisse, of Lincolnshire, somewhat an unknown "man, is put into the place [of Sir W. Waade's] by the favour "of the Lord Chamberlain [earl of Somerset] and his lady. The "gentleman is of too mild and gentle a disposition for such an "office. He is my old friend and acquaintance in France, and "lately renewed in town, where he hath lived past a year, nor "followed the court many a day." Sir Henry Wotton, in a letter of the 14th of May, 1613, [*ubi supra*, p. 13.] says, that Sir Gervase had been before one of the pensioners.

was thought to have come to a violent and untimely death. When this speech was reported back by my lord of Shrewsbury to Helwisse, *perculit illico animum*, he was stricken with it; and being a politic man, and of likelihood doubting that the matter would break forth at one time or other, and that others might have the start of him, and thinking to make his own case by his own tale, resolved with himself, upon this occasion, to discover to my lord of Shrewsbury and that counsellor, that there was an attempt, whereto he was privy, to have poisoned Overbury by the hands of his under-keeper Weston; but that he checked it, and put it by, and dissuaded it, and related so much to him indeed: but then he left it thus, that it was but an attempt, or untimely birth, never executed; and as if his own fault had been no more, but that he was honest in forbidding, but fearful of revealing and impeaching or accusing great persons; and so with this fine point thought to save himself.

But that great counsellor of state wisely considering, that by the lieutenant's own tale it could not be simply a permission or weakness; for that Weston was never displaced by the lieutenant, notwithstanding that attempt; and coupling the sequel by the beginning, thought it matter fit to be brought before his Majesty, by whose appointment Helwisse set down the like declaration in writing.

Upon this ground the King playeth Solomon's part, *Gloria Dei celare rem; et Gloria Regis investigare rem;* and sets down certain papers of his own hand, which I might term to be *claves justitiæ*, keys of justice; and may serve for a precedent both for Princes to imitate, and for a direction for judges to follow: and his Majesty carried the balance with a constant and steady hand, evenly and without prejudice, whether it were a true accusation of the one part, or a practice and factious device of the other: which writing, because I am not able to express according to the worth thereof, I will desire your lordship anon to hear read.

This excellent foundation of justice being laid by his Majesty's own hand, it was referred unto some

counsellors to examine farther, who gained some degrees of light from Weston, but yet left it imperfect.

After it was referred to Sir Edward Coke, Chief Justice of the King's Bench, as a person best practised in legal examinations, who took a great deal of indefatigable pains in it, without intermission, having, as I have heard him say, taken at least three hundred examinations in this business.

But these things were not done in a corner. I need not speak of them. It is true, that my lord Chief Justice, in the dawning and opening of the light, finding that the matter touched upon these great persons, very discreetly became suitor to the King to have greater persons than his own rank joined with him. Whereupon, your lordship, my lord High Steward of England, to whom the King commonly resorteth *in arduis*, and my lord Steward of the King's house, and my lord Zouch, were joined with him.

Neither wanted there this while practice to suppress testimony, to deface writings, to weaken the King's resolution, to slander the justice, and the like. Nay, when it came to the first solemn act of justice, which was the arraignment of Weston, he had his lesson to stand mute; which had arrested the wheel of justice. But this dumb devil, by the means of some discreet divines, and the potent charm of justice, together, was cast out. Neither did this poisonous adder stop his ear to those charms, but relented, and yielded to his trial.

Then follow the proceedings of justice against the other offenders, Turner, Helwisse, Franklin.

But all these being but the organs and instruments of this fact, the actors and not the authors, justice could not have been crowned without this last act against these great persons. Else Weston's censure or prediction might have been verified, when he said, he hoped the small flies should not be caught, and the great escape. Wherein the King being in great straits, between the defacing of his honour and of his creature, hath, according as he useth to do, chosen the better part, reserving always mercy to himself.

The time also of this justice hath had its true motions. The time until this Lady's deliverance was due unto honour, Christianity, and humanity, in respect of her great belly. The time since was due to another kind of deliverance too; which was, that some causes of estate, that were in the womb, might likewise be brought forth, not for matter of justice, but for reason of state. Likewise this last procrastination of days had the like weighty grounds and causes. And this is the true and brief representation of this extreme work of the King's justice.

Now for the evidence against this lady, I am sorry I must rip it up. I shall first shew you the purveyance or provisions of the poisons: that they were seven in number brought to this Lady, and by her billetted and laid up till they might be used: and this done with an oath or vow of secrecy, which is like the Egyptian darkness, a gross and palpable darkness, that may be felt.

Secondly, I shall shew you the exhibiting and sorting of this same number or volley of poisons: white arsenic was fit for salt, because it is of like body and colour. The poison of great spiders, and of the venomous fly cantharides, was fit for pigs sauce or partridge sauce, because it resembled pepper. As for mercury-water, and other poisons, they might be fit for tarts, which is a kind of hotch-pot, wherein no one colour is so proper: and some of these were delivered by the hands of this Lady, and some by her direction.

Thirdly, I shall prove and observe unto you the cautions of these poisons; that they might not be too swift, lest the world should startle at it by the suddenness of the dispatch: but they must abide long in the body, and work by degrees: and for this purpose there must be essays of them upon poor beasts, *etc.*

And lastly, I shall shew you the rewards of this impoisonment, first demanded by Weston, and denied, because the deed was not done; but after the deed done and perpetrated, that Overbury was dead, then performed and paid to the value of 180*l.*

And so without farther aggravation of that, which in itself bears its own tragedy, I will conclude with the confessions of this Lady herself, which is the strongest support of justice; and yet is the footstool of mercy. For, as the Scripture says, *Mercy and Truth have kissed each other;* there is no meeting or greeting of mercy, till there be a confession, or trial of truth. For these read,

Franklin, November 16,
Franklin, November 17,
Rich. Weston, October 1,
Rich. Weston, October 2,
Will. Weston, October 2,
Rich. Weston, October 3,
Helwisse, October 2,
The Countess's letter without date,
The Countess's confession, January 8.

THE

CHARGE,

Given May 24, 1616.

BY WAY OF EVIDENCE,

BY

SIR FRANCIS BACON, KNIGHT,

HIS MAJESTY'S ATTORNEY-GENERAL,

BEFORE THE LORD HIGH STEWARD, AND THE PEERS*;

AGAINST

FRANCES, COUNTESS OF SOMERSET,

Concerning the poisoning of Sir THOMAS OVERBURY.

It may please your Grace, my lord High Steward of England, and you my lords the peers:

I AM very glad to hear this unfortunate lady doth take this course, to confess fully and freely, and thereby to give glory to God and to justice. It is, as I may term it, the nobleness of an offender to confess: and therefore those meaner persons, upon whom justice passed before, confessed not; she doth. I know your lordships cannot behold her without compassion: many things may move you, her youth, her person, her sex, her noble family; yea, her provocations, if I should enter into the cause itself, and furies about her; but chiefly her penitency and confession. But justice is the work of this day; the mercy-seat was in the inner part of the temple; the throne is public. But since this lady hath by her confession prevented my evidence, and your verdict, and that this day's labour is eased; there resteth, in the legal proceeding, but for me to pray that her confession may be recorded, and judgment thereupon.

* The Lord Chancellor Egerton, lord Ellesmere, and earl of Bridgwater.

But because your lordships the peers are met, and that this day and to-morrow are the days that crown all the former justice; and that in these great cases it hath been ever the manner to respect honour and satisfaction, as well as the ordinary parts and forms of justice; the occasion itself admonisheth me to give your lordships and the hearers this contentment, as to make declaration of the proceedings of this excellent work of the King's justice, from the beginning to the end.

It may please your grace, my lord High Steward of England: this is now the second time, within the space of thirteen years reign of our happy sovereign, that this high tribunal-seat, ordained for the trial of peers, hath been opened and erected, and that with a rare event, supplied and exercised by one and the same person, which is a great honour unto you, my lord Steward.

In all this mean time the King hath reigned in his white robe, not sprinkled with any one drop of the blood of any of his nobles of this kingdom. Nay, such have been the depths of his mercy, as even those noblemens bloods, against whom the proceeding was at Winchester, Cobham and Grey, were attainted and corrupted, but not spilt or taken away; but that they remained rather spectacles of justice in their continual imprisonment, than monuments of justice in the memory of their suffering.

It is true that the objects of his justice then and now were very differing: for then it was the revenge of an offence against his own person and crown, and upon persons that were malcontents, and contraries to the state and government; but now it is the revenge of the blood and death of a particular subject, and the cry of a prisoner: it is upon persons that were highly in his favour; whereby his Majesty, to his great honour, hath shewed to the world, as if it were written in a sun-beam, that he is truly the lieutenant of Him with whom there is no respect of persons; that his affections royal are above his affections private: that his favours and nearness about him are not like popish sanctuaries, to privilege malefactors; and that

his being the best master in the world doth not let him from being the best King in the world. His people, on the other side, may say to themselves, I will lie down in peace, for God, the King, and the Law, protect me against great and small. It may be a discipline also to great men, especially such as are swoln in their fortunes from small beginnings, that the King is as well able to level mountains, as to fill valleys, if such be their desert.

But to come to the present case: The great frame of justice, my lords, in this present action, hath a vault, and hath a stage; a vault, wherein these works of darkness were contrived; and a stage, with steps, by which it was brought to light.

For the former of these, I will not lead your lordships into it, because I will engrieve nothing against a penitent; neither will I open any thing against him that is absent. The one I will give to the laws of humanity, and the other to the laws of justice: for I shall always serve my master with a good and sincere conscience, and, I know, that he accepteth best. Therefore I will reserve that till to-morrow, and hold myself to that which I called the stage or theatre, whereunto indeed it may be fitly compared: for that things were first contained within the invisible judgments of God, as within a curtain, and after came forth, and were acted most worthily by the King, and right well by his ministers.

Sir Thomas Overbury was murdered by poison, September 15, 1613. This foul and cruel murder did for a time cry secretly in the ears of God; but God gave no answer to it, otherwise than by that voice, which sometimes he useth, which is *vox populi*, the speech of the people: for there went then a murmur that Overbury was poisoned; and yet the same submiss and low voice of God, the speech of the vulgar people, was not without a counter-tenor or counter-blast of the devil, who is the common author both of murder and slander; for it was given out that Overbury was dead of a foul disease; and his body, which they had made *corpus Judaicum* with their poisons, so as it had no whole

part, must be said to be leprosed with vice, and so his name poisoned as well as his body. For as to dissoluteness, I have not heard the gentleman noted with it; his faults were of insolency, turbulency, and the like of that kind.

Mean time there was some industry used, of which I will not now speak, to lull asleep those that were the revengers of the blood, the father and the brother of the murdered. And in these terms things stood by the space of two years, during which time God did so blind the two great procurers, and dazzle them with their greatness, and blind and nail fast the actors and instruments with security upon their protection, as neither the one looked about them, nor the other stirred or fled, or were conveyed away, but remained here still, as under a privy arrest of God's judgments; insomuch as Franklin, that should have been sent over to the Palsgrave with good store of money, was, by God's providence and the accident of a marriage of his, diverted and stayed.

But about the beginning of the progress the last summer, God's judgments began to come out of their depths. And as the revealing of murder is commonly such as a man said, *a Domino hoc factum est; it is God's work, and it is marvellous in our eyes:* so in this particular it was most admirable; for it came forth first by a compliment, a matter of courtesy. My lord of Shrewsbury, that is now with God, recommended to a counsellor of state, of special trust by his place, the late lieutenant Helwisse*, only for acquaintance, as an honest and worthy gentleman, and desired him to know him, and to be acquainted with him. That counsellor answered him civilly, that my lord did him a favour, and that he should embrace it willingly; but he must let his lordship know, that there did lie a heavy imputation upon that gentleman, Helwisse; for that Sir Thomas Overbury, his prisoner,

* Called in Sir H. Wotton's *Reliq.* p. 413. *Elvis.* In Sir A. Welden's *Court of K. James*, p. 107. *Elwaies.* In *Aulic. Coquin.* p. 141. *Ellowaies.* In Sir W. Dugdale's *Baron. of England*, Tom. ii. p. 425. *Elwayes.* In Baker, p. 434. *Yelvis.*

was thought to have come to a violent and an untimely death. When this speech was reported back by my lord of Shrewsbury to Helwisse, *percussit illico animum*, he was strucken with it: and being a politic man, and of likelihood doubting that the matter would break forth at one time or other, and that others might have the start of him, and thinking to make his own case by his own tale, resolved with himself upon this occasion to discover unto my lord of Shrewsbury, and that counsellor, that there was an attempt, whereunto he was privy, to have poisoned Overbury by the hands of his under-keeper Weston; but that he checked it, and put it by, and dissuaded it. But then he left it thus, that it was but as an attempt, or an untimely birth, never executed; and as if his own fault had been no more, but that he was honest in forbidding, but fearful of revealing and impeaching, or accusing great persons: and so with this fine point thought to save himself.

But that counsellor of estate, wisely considering that by the lieutenant's own tale it could not be simply a permission or weakness; for that Weston was never displaced by the lieutenant, notwithstanding that attempt; and coupling the sequel by the beginning, thought it matter fit to be brought before his Majesty, by whose appointment Helwisse set down the like declaration in writing.

Upon this ground the King playeth Solomon's part, *Gloria Dei celare rem, et gloria Regis investigare rem*, and sets down certain papers of his own hand, which I might term to be *claves justitiæ*, keys of justice; and may serve both for a precedent for Princes to imitate, and for a direction for judges to follow. And his Majesty carried the balance with a constant and steady hand, evenly and without prejudice, whether it were a true accusation of the one part, or a practice and factious scandal of the other: which writing, because I am not able to express according to the worth thereof, I will desire your lordships anon to hear read.

This excellent foundation of justice being laid by his Majesty's own hand, it was referred unto some

counsellors to examine farther; who gained some degrees of light from Weston, but yet left it imperfect.

After it was referred to Sir Edward Coke, Chief Justice of the King's bench, as a person best practised in legal examinations; who took a great deal of indefatigable pains in it without intermission, having, as I have heard him say, taken at least three hundred examinations in this business.

But these things were not done in a corner, I need not speak of them. It is true that my lord Chief Justice, in the dawning and opening of the light, finding the matter touched upon these great persons, very discreetly became suitor to the King, to have greater persons than his own rank joined with him; whereupon your lordships, my lord High Steward of England, my lord Steward of the King's house, and my lord Zouch, were joined with him.

Neither wanted there, this while, practice to suppress testimony, to deface writings, to weaken the King's resolution, to slander the justice, and the like. Nay, when it came to the first solemn act of justice, which was the arraignment of Weston, he had his lesson to stand mute, which had arrested the whole wheel of justice, but this dumb devil, by the means of some discreet divines, and the potent charm of justice together, was cast out; neither did this poisonous adder stop his ear to these charms, but relented, and yielded to his trial.

Then followed the other proceedings of justice against the other offenders, Turner, Helwisse, Franklin.

But all these being but the organs and instruments of this fact, the actors, and not the authors, justice could not have been crowned without this last act against these great persons; else Weston's censure or prediction might have been verified, when he said, he hoped the small flies should not be caught, and the greater escape. Wherein the King, being in great straits between the defacing of his honour, and of his creature, hath, according as he used to do, chosen the better part, reserving always mercy to himself.

The time also of justice hath had its true motions. The time until this lady's deliverance was due unto honour, Christianity, and humanity, in respect of her great belly. The time since was due to another kind of deliverance too; which was, that some causes of estate which were in the womb might likewise be brought forth, not for matter of justice, but for reason of state. Likewise this last procrastination of days had the like weighty grounds and causes.

But, my lords, where I speak of a stage, I doubt I hold you upon the stage too long. But before I pray judgment, I pray your lordships to hear the King's papers read, that you may see how well the King was inspired, and how nobly he carried it, that innocency might not have so much as aspersion.

Frances, Countess of Somerset, hath been indicted and arraigned, as accessary before the fact, for the murder and impoisonment of Sir Thomas Overbury, and hath pleaded guilty, and confesseth the indictment: I pray judgment against the prisoner.

THE

CHARGE

OF

SIR FRANCIS BACON, KNIGHT,

HIS MAJESTY'S ATTORNEY-GENERAL,

BY WAY OF EVIDENCE.

BEFORE THE LORD HIGH STEWARD, AND THE PEERS,

AGAINST

ROBERT, EARL OF SOMERSET,

Concerning the poisoning of OVERBURY.

It may please your Grace, my lord High Steward of England, and you my lords the peers:

YOU have here before you Robert earl of Somerset, to be tried for his life, concerning the procuring and consenting to the impoisonment of Sir Thomas Overbury, then the King's prisoner in the Tower of London, as an accessary before the fact.

I know your lordships cannot behold this nobleman, but you must remember his great favour with the King, and the great place that he hath had and born, and must be sensible that he is yet of your number and body, a peer as you are; so that you cannot cut him off from your body but with grief; and therefore that you will expect from us, that give in the King's evidence, sound and sufficient matter of proof to satisfy your honours and consciences.

As for the manner of the evidence, the King our master, who among his other virtues excelleth in that virtue of the imperial throne, which is justice, hath given us in commandment that we should not expatiate, nor make invectives, but materially pursue the evidence, as it conduceth to the point in question; a matter, that

though we are glad of so good a warrant, yet we should have done of ourselves: for far be it from us, by any strains of wit or art, to seek to play prizes, or to blazon our names in blood, or to carry the day otherwise than upon just grounds. We shall carry the lanthorn of justice, which is the evidence, before your eyes upright, and to be able to save it from being put out with any winds of evasion or vain defences, that is our part; and within that we shall contain ourselves, not doubting at all, but that the evidence itself will carry such force as it shall need no vantage or aggravation.

My lords, the course which I will hold in delivering that which I shall say, for I love order, shall be this:

First, I will speak somewhat of the nature and greatness of the offence which is now to be tried; not to weigh down my lord with the greatness of it, but contrariwise to shew that a great offence deserveth a great proof, and that the King, however he might esteem this gentleman heretofore, as the signet upon his finger, to use the Scripture-phrase, yet in such case as this he was to put him off.

Secondly, I will use some few words touching the nature of the proofs, which in such a case are competent.

Thirdly, I will state the proofs.

Fourthly and lastly, I will produce the proofs, either out of examinations and matters in writing, or witnesses, *viva voce*.

For the offence itself, it is of crimes, next unto high treason, the greatest; it is the foulest of felonies. And take this offence with the circumstances, it hath three degrees or stages; that it is murder; that it is murder by impoisonment; that it is murder committed upon the King's prisoner in the Tower: I might say, that it is murder under the colour of friendship; but this is a circumstance moral; I leave that to the evidence itself.

For murder, my lords, the first record of justice that was in the world was a judgment upon a murderer in the person of Adam's first-born, Cain; and though it was not punished by death, but with

banishment and mark of ignominy, in respect of the primogeniture, or population of the world, or other points of God's secret decree, yet it was judged, and was, as it is said, the first record of justice. So it appeareth likewise in Scripture, that the murder of Abner by Joab, though it were by David respited in respect of great services past, or reason of state, yet it was not forgotten. But of this I will say no more. It was ever admitted, and ranked in God's own tables, that murder is of offences between man and man, next unto treason and disobedience unto authority, which some divines have referred to the first table, because of the lieutenancy of God in princes.

For impoisonment, I am sorry it should be heard of in this kingdom: it is not *nostri generis nec sanguinis:* it is an Italian crime, fit for the court of Rome, where that person, which intoxicateth the Kings of the earth with his cup of poison, is many times really and materially intoxicated and impoisoned himself.

But it hath three circumstances, which make it grievous beyond other murders: whereof the first is, that it takes away a man in full peace, in God's and the King's peace: he thinketh no harm, but is comforting of nature with refection and food; so that, as the Scripture saith, *his table is made a snare.*

The second is, that it is easily committed, and easily concealed; and on the other side, hardly prevented, and hardly discovered: for murder by violence, princes have guards, and private men have houses, attendants, and arms: neither can such murder be committed but *cum sonitu,* and with some overt and apparent act that may discover and trace the offender. But as for poison, the cup itself of princes will scarce serve, in regard of many poisons that neither discolour nor distaste.

And the last is, because it concerneth not only the destruction of the maliced man, but of any other; *Quis modo tutus erit?* for many times the poison is prepared for one, and is taken by another: so that men die other mens deaths; *concidit infelix alieno vulnere:* and it is, as the Psalm calleth it, *sagitta nocte volans;*

the arrow that flieth by night, it hath no aim or certainty.

Now for the third degree of this particular offence, which is, that it was committed upon the King's prisoner, who was out of his own defence, and merely in the King's protection, and for whom the King and state was a kind of respondent; is a thing that aggravates the fault much. For certainly, my lord of Somerset, let me tell you this, that Sir Thomas Overbury is the first man that was murdered in the Tower of London, since the murder of the two young princes. Thus much of the offence, now to the proof.

For the nature of the proofs, your lordships must consider, that impoisonment, of all offences is the most secret; so secret, as that if in all cases of impoisonment you should require testimony, you were as good proclaim impunity.

Who could have impeached Livia, by testimony, of the impoisoning figs upon the tree, which her husband was wont to gather with his own hands?

Who could have impeached Parisatis for the poisoning of one side of the knife that she carved with, and keeping the other side clean; so that herself did eat of the same piece of meat that the lady did that she did impoison? The cases are infinite, and need not to be spoken of, of the secrecy of impoisonments; but wise triers must take upon them, in these secret cases, Solomon's spirit, that, where there could be no witnesses, collected the act by the affection.

But yet we are not to come to one case: for that which your lordships are to try is not the act of impoisonment, for that is done to your hand; all the world by law is concluded to say, that Overbury was impoisoned by Weston.

But the question before you is of the procurement only, and of the abetting, as the law termeth it, as accessary before the fact: which abetting is no more but to do or use any act or means, which may aid or conduce unto the impoisonment.

So that it is not the buying or making of the poison, or the preparing, or confecting, or commixing of it, or

the giving or sending or laying the poison, that are the only acts that do amount unto abetment. But if there be any other act or means done or used to give the opportunity of impoisonment, or to facilitate the execution of it, or to stop or divert any impediments that might hinder it, and this be with an intention to accomplish and atchieve the impoisonment; all these are abetments, and accessaries before the fact. I will put you a familiar example. Allow there be a conspiracy to murder a man as he journeys by the way, and it be one man's part to draw him forth to that journey by invitation, or by colour of some business; and another takes upon him to dissuade some friend of his, whom he had a purpose to take in his company, that he be not too strong to make his defence; and another hath the part to go along with him, and to hold him in talk till the first blow be given: all these, my lords, without scruple are abettors to this murder, though none of them give the blow, nor assist to give the blow.

My lords, he is not the hunter alone that lets slip the dog upon the deer, but he that lodges the deer, or raises him, or puts him out, or he that sets a toil that he cannot escape, or the like.

But this, my lords, little needeth in this present case, where there is such a chain of acts of impoisonment as hath been seldom seen, and could hardly have been expected, but that greatness of fortune maketh commonly grossness in offending.

To descend to the proofs themselves, I shall keep this course.

First, I will make a narrative or declaration of the fact itself.

Secondly, I will break and distribute the proofs as they concern the prisoner.

And thirdly, according to that distribution, I will produce them, and read them, or use them.

So that there is nothing that I shall say, but your lordship, my lord of Somerset, shall have three thoughts or cogitations to answer it: First, when I open it, you may take your aim. Secondly, when I distribute it,

you may prepare your answers without confusion. And lastly, when I produce the witnesses or examinations themselves, you may again ruminate and re-advise how to make your defence. And this I do the rather, because your memory or understanding may not be oppressed or overladen with the length of evidence, or with confusion of order. Nay more, when your lordship shall make your answers in your time, I will put you in mind, when cause shall be, of your omissions.

First, therefore, for the simple narrative of the fact. Sir Thomas Overbury for a time was known to have had great interest and great friendship with my lord of Somerset, both in his meaner fortunes, and after; insomuch as he was a kind of oracle of direction unto him; and, if you will believe his own vaunts, being of an insolent Thrasonical disposition, he took upon him, that the fortune, reputation, and understanding of this gentleman, who is well known to have had a better teacher, proceeded from his company and counsel.

And this friendship rested not only in conversation and business of court, but likewise in communication of secrets of estate. For my lord of Somerset, at that time exercising, by his Majesty's special favour and trust, the office of the secretary provisionally, did not forbear to acquaint Overbury with the King's packets of dispatches from all parts, Spain, France, the Low-Countries, *etc.* And this not by glimpses, or now and then rounding in the ear for a favour, but in a settled manner: packets were sent, sometimes opened by my lord, sometimes unbroken, unto Overbury, who perused them, copied, registered them, made tables of them as he thought good: so that, I will undertake, the time was when Overbury knew more of the secrets of state than the council-table did. Nay, they were grown to such an inwardness, as they made a play of all the world besides themselves: so as they had ciphers and jargons for the King, the Queen, and all the great men; things seldom used, but either by princes and their ambassadors and ministers, or by

such as work and practise against, or at least upon, princes.

But understand me, my lord, I shall not charge you this day with any disloyalty; only I say this for a foundation, that there was a great communication of secrets between you and Overbury, and that it had relation to matters of estate, and the greatest causes of this kingdom.

But, my lords, as it is a principle in nature, that the best things are in their corruption the worst, and the sweetest wine makes the sharpest vinegar; so fell it out with them, that this excess, as I may term it, of friendship ended in mortal hatred on my lord of Somerset's part.

For it fell out, some twelve months before Overbury's imprisonment in the Tower, that my lord of Somerset was entered into an unlawful love towards his unfortunate lady, then countess of Essex: which went so far, as it was then secretly projected, chiefly between my lord Privy Seal and my lord of Somerset, to effect a nullity in the marriage with my lord of Essex, and so to proceed to a marriage with Somerset.

This marriage and purpose did Overbury mainly oppugn, under pretence to do the true part of a friend, for that he counted her an unworthy woman; but the truth was, that Overbury, who, to speak plainly, had little that was solid for religion or moral virtue, but was a man possessed with ambition and vain-glory, was loth to have any partners in the favour of my lord of Somerset, and especially not the house of the Howards, against whom he had always professed hatred and opposition: so all was but miserable bargains of ambition.

And, my lords, that this is no sinister construction, will well appear unto you, when you shall hear that Overbury makes his brags to my lord of Somerset, that he had won him the love of the lady by his letters and industry: so far was he from cases of conscience in this matter. And certainly, my lords, howsoever the tragical misery of that poor gentleman Overbury ought somewhat to obliterate his faults; yet because

we are not now upon point of civility, but to discover the face of truth to the face of justice; and that it is material to the true understanding of the state of this cause; Overbury was naught and corrupt, the ballads must be amended for that point.

But to proceed; when Overbury saw that he was like to be dispossessed of my lord here, whom he had possessed so long, and by whose greatness he had promised himself to do wonders; and being a man of an unbounded and impetuous spirit, he began not only to dissuade, but to deter him from that love and marriage; and finding him fixed, thought to try stronger remedies, supposing that he had my lord's head under his girdle, in respect of communication of secrets of estate, or, as he calls them himself in his letters, secrets of all natures; and therefore dealt violently with him, to make him desist, with menaces of discovery of secrets, and the like.

Hereupon grew two streams of hatred upon Overbury; the one, from the lady, in respect that he crossed her love, and abused her name, which are furies to women; the other, of a deeper and more mineral nature, from my lord of Somerset himself; who was afraid of Overbury's nature, and that if he did break from him and fly out, he would mine into him and trouble his whole fortunes.

I might add a third stream from the earl of Northampton's ambition, who desires to be first in favour with my lord of Somerset; and knowing Overbury's malice to himself and his house, thought that man must be removed and cut off. So it was amongst them resolved and decreed that Overbury must die.

Hereupon they had variety of devices. To send him beyond sea, upon occasion of imployment, that was too weak; and they were so far from giving way to it, as they crossed it. There rested but two ways, quarrel or assault, and poison. For that of assault, after some proposition and attempt, they passed from it; it was a thing too open, and subject to more variety of chances. That of poison likewise was a hazardous thing, and subject to many preventions and

cautions; especially to such a jealous and working brain as Overbury had, except he were first fast in their hands.

Therefore the way was first to get him into a trap, and lay him up, and then they could not miss the mark. Therefore in execution of this plot it was devised, that Overbury should be designed to some honourable imployment in foreign parts, and should under-hand by the lord of Somerset be incouraged to refuse it; and so upon that contempt he should be laid prisoner in the Tower, and then they would look he should be close enough, and death should be his bail. Yet were they not at their end. For they considered that if there was not a fit lieutenant of the Tower for their purpose, and likewise a fit under-keeper of Overbury; first, they should meet with many impediments in the giving and exhibiting the poison. Secondly, they should be exposed to note and observation that might discover them. And thirdly, Overbury in the mean time might write clamorous and furious letters to other his friends, and so all might be disappointed. And therefore the next link of the chain was to displace the then lieutenant Waade, and to place Helwisse, a principal abettor in the impoisonment: again, to displace Cary, that was the under-keeper in Waade's time, and to place Weston, who was the principal actor in the impoisonment; and this was done in such a while, that it may appear to be done, as it were, with one breath, as there were but fifteen days between the commitment of Overbury, the displacing of Waade, the placing of Helwisse, the displacing of Cary the under-keeper, the placing of Weston, and the first poison given two days after.

Then when they had this poor gentleman in the Tower close prisoner, where he could not escape nor stir, where he could not feed but by their hands, where he could not speak nor write but through their trunks; then was the time to execute the last act of this tragedy.

Then must Franklin be purveyor of the poisons, and procure five, six, seven several potions, to be sure to

hit his complexion. Then must Mrs. Turner be the say-mistress of the poisons to try upon poor beasts, what is present, and what works at distance of time. Then must Weston be the tormentor, and chase him with poison after poison; poison in salts, poison in meats, poison in sweetmeats, poison in medicines and vomits, until at last his body was almost come, by use of poisons, to the state that Mithridates's body was by the use of treacle and preservatives, that the force of the poisons, were blunted upon him: Weston confessing, when he was chid for not dispatching him, that he had given him enough to poison twenty men. Lastly, because all this asked time, courses were taken by Somerset, both to divert all means of Overbury's delivery, and to entertain Overbury by continual letters, partly of hopes and projects for his delivery, and partly of other fables and negociations; somewhat like some kind of persons, which I will not name, which keep men in talk of fortune-telling, when they have a felonious meaning.

And this is the true narrative of this act of impoisonment, which I have summarily recited.

Now for the distribution of the proofs, there are four heads of proofs to prove you guilty, my lord of Somerset, of this impoisonment; whereof two are precedent to the imprisonment, the third is present, and the fourth is following or subsequent. For it is in proofs as it is in lights, there is a direct light, and there is a reflexion of light, or back-light.

The first head or proof thereof is, That there was a root of bitterness, a mortal malice or hatred, mixed with deep and bottomless fears, that you had towards Sir Thomas Overbury.

The second is, That you were the principal actor, and had your hand in all those acts, which did conduce to the impoisonment, and which gave opportunity and means to effect it; and without which the impoisonment could never have been, and which could serve or tend to no other end but to the impoisonment.

The third is, That your hand was in the very im-

poisonment itself, which is more than needs to be proved; that you did direct poison; that you did deliver poison; that you did continually hearken to the success of the impoisonment; and that you spurred it on, and called for dispatch when you thought it lingered.

And lastly, That you did all the things after the impoisonment, which may detect a guilty conscience, for the smothering of it, and avoiding punishment for it: which can be but of three kinds: That you suppressed, as much as in you was, testimony; That you did deface, and destroy, and clip and misdate all writings that might give light to the impoisonment; and that you did fly to the altar of guiltiness, which is a pardon, and a pardon of murder, and a pardon for yourself, and not for your lady.

In this, my lord, I convert my speech to you, because I would have you attend the points of your charge, and so of your defence the better. And two of these heads I have taken to myself, and left the other two to the King's two serjeants.

For the first main part, which is, the mortal hatred, coupled with fear, that was in my lord of Somerset towards Overbury, although he did palliate it with a great deal of hypocrisy and dissimulation even to the end; I shall prove it, my lord Steward, and you my lords and peers, manifestly, by matter both of oath and writing. The root of this hatred was that that hath cost many a man's life, that is, fear of discovering secrets: secrets, I say, of a high and dangerous nature: Wherein the course that I will hold, shall be this:

First, I will shew that such a breach and malice was between my lord and Overbury, and that it burst forth into violent menaces and threats on both sides.

Secondly, That these secrets were not light, but of a high nature; for I will give you the elevation of the pole. They were such as my lord of Somerset for his part had made a vow, that Overbury should neither live in court nor country. That he had likewise opened himself and his own fears so far, that if Overbury ever

came forth of the Tower, either Overbury or himself must die for it. And of Overbury's part, he had threatened my lord, that whether he did live or die, my lord's shame should never die, but he would leave him the most odious man of the world. And farther, that my lord was like enough to repent it, in the place where Overbury wrote, which was the Tower of London. He was a true prophet in that: so here is the height of the secrets.

Thirdly, I will shew you, that all the King's business was by my lord put into Overbury's hands; so as there is work enough for secrets, whatsoever they were: and like princes confederates, they had their ciphers and jargons.

And lastly, I will shew you that it is but a toy to say that the malice was only in respect he spake dishonourably of the lady; or for doubt of breaking the marriage: for that Overbury was a coadjutor to that love, and the lord of Somerset was as deep in speaking ill of the lady as Overbury. And again, it was too late for that matter, for the bargain of the match was then made and past. And if it had been no more but to remove Overbury from disturbing of the match, it had been an easy matter to have banded over Overbury beyond seas, for which they had a fair way; but that would not serve their turn.

And lastly, *periculum periculo vincitur*, to go so far as an impoisonment, must have a deeper malice than flashes: for the cause must bear a proportion to the effect.

For the next general head of proofs, which consists in acts preparatory to the middle acts, they are in eight several points of the compass, as I may term it.

First, That there were devices and projects to dispatch Overbury, or to overthrow him, plotted between the countess of Somerset, the earl of Somerset, and the earl of Northampton, before they fell upon the impoisonment: for always before men fix upon a course of mischief, there be some rejections: but die he must one way or other.

Secondly, That my lord of Somerset was a principal

practiser, I must speak it, in a most perfidious manner, to set a train or trap for Overbury to get him into the Tower; without which they never durst have attempted the impoisonment.

Thirdly, That the placing of the lieutenant Helwisse, one of the impoisoners, and the displacing of Waade, was by the means of my lord of Somerset.

Fourthly, That the placing of Weston the underkeeper, who was the principal impoisoner, and the displacing of Cary, and the doing of all this within fifteen days after Overbury's commitment, was by the means and countenance of my lord of Somerset. And these two were the active instruments of the impoisonment: and this was a business that the lady's power could not reach unto.

Fifthly, That because there must be a time for the tragedy to be acted, and chiefly because they would not have the poisons work upon the sudden; and for that the strength of Overbury's nature, or the very custom of receiving poison into his body, did overcome the poisons, that they wrought not so fast; therefore Overbury must be held in the Tower. And as my lord of Somerset got him into the trap, so he kept him in, and abused him with continual hopes of liberty; and diverted all the true and effectual means of his liberty, and made light of his sickness and extremities.

Sixthly, That not only the plot of getting Overbury into the Tower, and the devices to hold him and keep him there; but the strange manner of his close keeping, being in but for a contempt, was by the device and means of my lord of Somerset, who denied his father to see him, denied his servants that offered to be shut up close prisoners with him; and in effect handled it so, that he was close prisoner to all his friends, and open and exposed to all his enemies.

Seventhly, That the advertisement which my lady received from time to time from the lieutenant or Weston, touching Overbury's state of body or health, were ever sent up to the court, though it were in progress, and that from my lady: such a thirst and listening this lord had to hear that he was dispatched

Lastly, There was a continual negotiation to set Overbury's head on work, that he should make some recognition to clear the honour of the lady; and that he should become a good instrument towards her and her friends: all which was but entertainment; for your lordships shall plainly see divers of my lord of Northampton's letters, whose hand was deep in this business, written, I must say it, in dark words and clauses; that there was one thing pretended and another intended; that there was a real charge, and there was somewhat not real; a main drift, and a dissimulation. Nay farther, there be some passages which the peers in their wisdom will discern to point directly at the impoisonment.

[After this inducement followed the evidence itself.]

THE

EFFECT

OF THAT WHICH WAS SPOKEN

BY THE

LORD KEEPER OF THE GREAT SEAL OF ENGLAND,

AT THE TAKING OF HIS PLACE IN CHANCERY,

In Performance of the Charge his MAJESTY had given him when he received the Seal, May 7, 1617.

BEFORE I enter into the business of the court, I shall take advantage of so many honourable witnesses to publish and make known summarily, what charge the King's most excellent Majesty gave me when I received the seal, and what orders and resolutions I myself have taken in conformity to that charge; that the King may have the honour of direction, and I the part of obedience; whereby your lordships, and the rest of the presence, shall see the whole time of my sitting in the chancery, which may be longer or shorter, as it shall please God and the King, contracted into one hour. And this I do for three causes.

First, to give account to the King of his commandment.

Secondly, that it may be a guard and custody to myself, and my own doings, that I do not swerve or recede from any thing that I have professed in so noble company.

And thirdly, that all men that have to do with the chancery or the seal, may know what they shall expect, and both set their hearts and my ears at rest; not moving me in any thing against these rules; knowing that my answer is now turned from a *nolumus* into a *non possumus*. It is no more, I will not, but, I cannot, after this declaration.

And this I do also under three cautions.

This first is, that there be some things of a more secret and council-like nature, more fit to be acted than published. But those things which I shall speak of to-day are of a more public nature.

The second is, that I will not trouble this presence with every particular, which would be too long; but select those things which are of greatest efficacy, and conduce most *ad summas rerum;* leaving many other particulars to be set down in a table, according to the good example of my last predecessor in his beginning.

And lastly, that these imperatives, which I have made but to myself and my times, be without prejudice to the authority of the court, or to wiser men that may succeed me; and chiefly that they are wholly submitted unto the great wisdom of my Sovereign, and the absolutest Prince in judicature that hath been in the Christian world; for if any of these things which I intend to be subordinate to his directions, shall be thought by his Majesty to be inordinate, I shall be most ready to reform them. These things are but *tanquam album prætoris;* for so did the Roman prætors, which have the greatest affinity with the jurisdiction of the chancellor here, who used to set down at their entrance, how they would use their jurisdiction. And this I shall do, my lords, *in verbis masculis;* no flourishing or painted words, but such as are fit to go before deeds.

The King's charge, which is my lanthorn, rested upon four heads.

The first was, that I should contain the jurisdiction of the court within its true and due limits, without swelling or excess.

The second, that I should think the putting of the great seal to letters patents was not a matter of course to follow after precedent warrants; but that I should take it to be the maturity and fulness of the King's intentions: and therefore of the greatest parts of my trust, if I saw therein any scruple or cause of stay, that I should acquaint him, concluding with a *Quod dubites ne feceris.*

The third was, that I should retrench all unnecessary delays, that the subject might find that he did enjoy the same remedy against the fainting of the soul and the consumption of the estate; which was speedy justice. *Bis dat, qui cito dat.*

The fourth was, that justice might pass with as easy charge as might be; and that those same brambles, that grow about justice, of needless charge and expence, and all manner of exactions, might be rooted out so far as might be.

These commandments, my lords, are righteous, and, as I may term them, sacred; and therefore to use a sacred form, I pray God bless the King for his great care over the justice of the land, and give me, his poor servant, grace and power to observe his precepts.

Now for a beginning towards it, I have set down and applied particular orders to-day out of these four general heads.

For the excess or tumour of this court of chancery, I shall divide it into five natures.

The first is, when the court doth embrace and retain causes, both in matter and circumstance merely determinable and fit for the common law; for, my lords, the chancery is ordained to supply the law, and not to subvert the law. Now to describe unto you or delineate what those causes are that are fit for the court, or not fit for the court, were too long a lecture. But I will tell you what remedy I have prepared. I will keep the keys of the court myself, and will never refer any demurrer or plea, tending to discharge or dismiss the court of the cause, to any master of the chancery, but judge of it myself, or at least the master of the rolls. Nay farther, I will appoint regularly, that on the Tuesday of every week, which is the day of orders, first to hear motions of that nature before any other, that the subject may have his *vale* at first without attending, and that the court do not keep and accumulate a miscellany and confusion of causes of all natures.

The second point concerneth the time of the com-

plaint, and the late comers into the chancery; which stay till a judgment be passed against them at the common law, and then complain: wherein your lordships may have heard a great rattle and a noise of a *præmunire*, and I cannot tell what. But that question the King hath settled according to the ancient precedents in all times continued. And this I will say, that the opinion, not to relieve any case after judgment, would be a guilty opinion; guilty of the ruin, and naufrage, and perishing of infinite subjects: and as the King found it well out, why should a man fly into the chancery before he be hurt? The whole need not the physician, but the sick. But, my lords, the power would be preserved, but the practice would be moderate. My rule shall be therefore, that in case of complaints after judgment, except the judgments be upon *nihil dicit*, and cases which are but disguises of judgment, as that they be judgments obtained in contempt of a preceding order in this court, yea, and after verdicts also, I will have the party complainant enter into good bond to prove his suggestion: so that if he will be relieved against a judgment at common law upon matter of equity, he shall do it *tanquam in vinculis*, at his peril.

The third point of excess may be the over-frequent and facile granting of injunctions for the staying of the common laws, or the altering of possessions; wherein these shall be my rules.

I will grant no injunction merely upon priority of suit; that is to say, because this court was first possessed: a thing that was well reformed in the late lord chancellor's time, but usual in the chancellor Bromley's time; insomuch, as I remember, that Mr. Dalton the counsellor at law put a pasquil upon the court in nature of a bill; for seeing it was no more but, My lord, the bill came in on Monday, and the arrest at common law was on Tuesday, I pray the injunction upon priority of suit: he caused his client that had a loose debtor, to put his bill into the chancery before the bond due to him was forfeited, to desire an order that he might have his money at the day, because he

would be sure to be before the other. I do not mean to make it a matter of an horse-race who shall be first at Westminster-hall.

Neither will I grant an injunction upon matter contained in the bill only, be it never so smooth and specious; but upon matter confessed in the defendant's answer, or matter pregnant in writing, or of record; or upon contempt of the defendant in not appearing, or not answering, or trifling with the court by insufficient answering. For then it may be thought that the defendant stands out upon purpose to get the start at the common law, and so to take advantage of his own contempt; which may not be suffered.

As for injunctions for possession, I shall maintain possessions as they were at the time of the bill exhibited; and for the space of a year at the least before, except the possession were gotten by force or any trick.

Neither will I alter possession upon interlocutory orders, until a decree; except upon matter plainly confessed in the defendant's answer, joined also with a plain disability and insolvency in the defendant to answer the profits.

As for taking of possession away in respect of contempts, I will have all the process of the court spent first, and a sequestration of the profits before I come to an injunction.

The fourth point is concerning the communicating of the authority of the chancellor too far; and making, upon the matter, too many chancellors, by relying too much upon the reports of the masters of the chancery as concludent. I know, my lords, the masters of the chancery are reverend men; and the great mass of the business of the court cannot be sped without them; and it is a thing the chancellor may soon fall into for his own ease, to rely too much upon them. But the course that I will take generally shall be this; I will make no binding order upon any report of one of the masters, without giving a seven-night's day at the least, to shew cause against the report, which nevertheless I will have done modestly, and with due

reverence towards them: and again, I must utterly discontinue the making of an hypothetical or conditional order; that if a master of the chancery do certify thus and thus, that then it is so ordered without farther motion; for that it is a surprise, and giveth no time for contradiction.

The last point of excess is, if a chancellor shall be so much of himself, as he shall neglect assistance of reverend judges in cases of difficulty, especially if they touch upon law, or calling them, shall do it but *pro forma tantum*, and give no due respect to their opinions: wherein, my lords, preserving the dignity and majesty of the court, which I account rather increased than diminished by grave and due assistance, I shall never be found so sovereign or abundant in mine own sense, but I shall both desire and make true use of assistance. Nay, I assure your lordships, if I should find any main diversity of opinion of my assistants from mine own, though I know well the judicature of the court wholly resteth in myself; yet I think I should have recourse to the oracle of the King's own judgment, before I should pronounce. And so much for the temperate use of the authority of this court; for surely the health of a court, as well as of a body, consisteth in temperance.

For the second commandment of his Majesty, touching staying of grants at the great seal; there may be just cause of stay, either in the matter of the grant, or in the manner of passing the same. Out of both which I extract these six principal cases which I will now make known: all which, nevertheless, I understand to be wholly submitted to his Majesty's will and pleasure, after by me he shall have been informed; for if *iteratum mandatum* be come, obedience is better than sacrifice.

The first case is, where any matter of revenue, or treasure, or profit, passeth from his Majesty; my first duty shall be to examine, whether the grant hath passed in the due and natural course by the great officers of the revenue, the lord treasurer and chancellor of the exchequer, and with their privity; which if

I find it not to be, I must presume it to have passed in the dark, and by a kind of surreption; and I will make stay of it till his Majesty's pleasure be farther known.

Secondly, if it be a grant that is not merely vulgar, and hath not of course passed at the signet by a *fac simile*, but needeth science, my duty shall be to examine whether it hath passed by the learned counsel and had their docket; which is that his Majesty reads, and leads him. And if I find it otherwise, although the matter were not in itself inconvenient, yet I hold it a just cause of stay, for precedent's sake, to keep men in the right way.

Thirdly, if it be a grant which I conceive, out of my little knowledge, to be against the law; of which nature Theodosius was wont to say, when he was pressed, "I spake it, or I wrote it, but I granted it "not if it be unjust:" I will call the learned counsel to it, as well him that drew the book as the rest, or some of them: and if we find cause, I will inform his Majesty of our opinion, either by myself or some of them. And as for the judges, they are judges of grants past, but not of grants to come, except the King call them.

Fourthly, if the grants be against the King's public book of bounty, I am expressly commanded to stay them until the King either revise his book in general, or give direction in particular.

Fifthly, if, as a counsellor of estate, I do foresee inconvenience to ensue by the grant in reason of estate, in respect of the King's honour, or discontent, and murmur of the people; I will not trust mine own judgment, but I will either acquaint his Majesty with it, or the council table, or some such of my lords as I shall think fit.

Lastly, for matter of pardons; if it be for treason, misprision, murder, either expressed or involute, by a *non-obstante;* or of piracy, or of *præmunire*, or of fines, or exemplary punishment in the star-chamber, or some other natures; I shall by the grace of God stay them until his Majesty, who is the fountain of

grace, may resolve between God and him, how far grace shall abound or super-abound.

And if it be of persons attainted and convicted of robbery, burglary, *etc.* then will I examine whether the pardons passed the hand of any justice of assize, or other commissioners, before whom the trial was made; and if not, I think it my duty also to stay them.

And your lordships see in this matter of the seal, and his Majesty's royal commandment concerning the same, I mean to walk in the light; so that men may know where to find me: and this publishing thereof plainly, I hope, will save the King from a great deal of abuse, and me from a great deal of envy; when men shall see that no particular turn or end leads me, but a general rule.

For the third general head of his Majesty's precepts concerning speedy justice, it rests much upon myself, and much upon others: yet so, as my procuration may give some remedy and order to it. For myself, I am resolved that my decree shall come speedily, if not instantly, after the hearing, and my signed decree speedily upon my decree pronounced. For it hath been a manner much used of late in my last lord's time, of whom I learn much to imitate, and somewhat to avoid; that upon the solemn and full hearing of a cause nothing is pronounced in court, but breviates are required to be made; which I do not dislike in itself in causes perplexed. For I confess I have somewhat of the cunctative; and I am of opinion, that whosoever is not wiser upon advice than upon the sudden, the same man was no wiser at fifty than he was at thirty. And it was my father's ordinary word, "You "must give me time." But yet I find when such breviates were taken, the cause was sometimes forgotten a term or two, and then set down for a new hearing, three or four terms after. And in the mean time the subjects pulse beats swift, though the chancery pace be slow. Of which kind of intermission I see no use, and therefore I will promise regularly to pronounce my decree within few days after my hearing; and to sign my decree at the least in the vacation after the pronouncing. For fresh justice is the sweetest. And

to the end that there be no delay of justice, nor any other means-making or labouring, but the labouring of the counsel at the bar.

Again, because justice is a sacred thing, and the end for which I am called to this place, and therefore is my way to heaven; and if it be shorter, it is never a whit the worse, I shall by the grace of God, as far as God will give me strength, add the afternoon to the forenoon, and some fourth night of the vacation to the term, for the expediting and clearing of the causes of the court; only the depth of the three long vacations I would reserve in some measure free from business of estate, and for studies, arts and sciences, to which in my own nature I am most inclined.

There is another point of true expedition, which resteth much in myself, and that is in my manner of giving orders. For I have seen an affectation of dispatch turn utterly to delay at length: for the manner of it is to take the tale out of the counsellor at the bar his mouth, and to give a cursory order, nothing tending or conducing to the end of the business. It makes me remember what I heard one say of a judge that sat in chancery; that he would make forty orders in a morning out of the way, and it was out of the way indeed; for it was nothing to the end of the business: and this is that which makes sixty, eighty, an hundred orders in a cause, to and fro, begetting one another; and like Penelope's web, doing and undoing. But I mean not to purchase the praise of expeditive in that kind; but as one that have a feeling of my duty, and of the case of others. My endeavour shall be to hear patiently, and to cast my order into such a mold as may soonest bring the subject to the end of his journey.

As for delays that may concern others, first the great abuse is, that if the plaintiff have got an injunction to stay suits at the common law, then he will spin out his cause at length. But by the grace of God I will make injunctions but an hard pillow to sleep on; for if I find that he prosecutes not with effect, he may perhaps, when he is awake, find not only his injunction dissolved, but his cause dismissed.

There be other particular orders, I mean to take for *non* prosecution or faint prosecution, wherewith I will not trouble you now, because *summa sequar fastigia rerum.* And so much for matter of expedition.

Now for the fourth and last point of the King's commandment; for the cutting off unnecessary charge of the subject, a great portion of it is fulfilled in the precedent article; for it is the length of suits that doth multiply charges chiefly; but yet there are some other remedies that do conduce thereunto.

First, therefore, I will maintain strictly, and with severity, the former orders which I find my lord chancellor hath taken, for the immoderate and needless prolixity, and length of bills, and answers, and so forth; as well in punishing the party, as fining the counsel, whose hand I shall find at such bills, answers, *etc.*

Secondly, for all the examinations taken in the court, I do give charge unto the examiners, upon peril of losing their places, that they do not use any idle repetitions, or needless circumstances, in setting down the depositions taken by them; and I would I could help it likewise in the country, but that is almost impossible.

Thirdly, I shall take a diligent survey of the copies in chancery, that they have their just number of lines, and without open and wasteful writing.

Fourthly, I shall be careful there be no exaction of any new fees, but according as they have been heretofore set and tabled.

As for lawyers fees, I must leave that to the conscience and merit of the lawyer; and the estimation and gratitude of the client: but this I can do; I know there have used to attend this bar a number of lawyers that have not been heard sometimes, and scarce once or twice in a term; and that makes the client seek to great counsel and favourites, as they call them, for every order that a mean lawyer might as well dispatch, a term fitter for Kings than judges. And therefore to help the generality of lawyers, and therein to ease the client, I will constantly observe that every Tuesday,

and other days of orders, after nine o'clock strucken, I will hear the bar until eleven, or half an hour after ten at the least. And since I am upon the point whom I will hear, your lordships will give me leave to tell you a fancy. It falleth out, that there be three of us the King's servants in great places, that are lawyers by descent, Mr. Attorney son of a judge, Mr. Solicitor likewise son of a judge, and myself a chancellor's son.

Now because the law roots so well in my time, I will water it at the root thus far, as besides these great ones, I will hear any judge's son before a serjeant, and any serjeant's son before a reader, if there be not many of them.

Lastly, for the better ease of the subjects, and the bridling of contentious suits, I shall give better, that is greater, costs where the suggestions are not proved, than hath been hitherto used.

There be divers orders for the better reglement of this court; and for granting of writs, and for granting of benefices and others, which I shall set down in a table. But I will deal with no other to-day but such as have a proper relation to his Majesty's commandment; it being my comfort that I serve such a master, that I shall need to be but a conduit only for the conveying of his goodness to his people. And it is true, that I do affect and aspire to make good that saying, that *Optimus magistratus præstat optimæ legi;* which is true in his Majesty. And for myself, I doubt, I shall not attain it. But yet I have a domestic example to follow. My lords, I have no more to say, but now I will go on to the business of the court.

THE

SPEECH

WHICH WAS USED BY THE

LORD KEEPER OF THE GREAT SEAL,

In the Star-Chamber, before the Summer Circuits, the King being then in Scotland, 1617.

THE King, by his perfect declaration published in this place concerning judges and justices, hath made the speech of his chancellor, accustomed before the circuits, rather of ceremony than of use. For as in his book to his son he hath set forth a true character and platform of a King; so in this his speech he hath done the like of a judge and justice: which sheweth, that as his Majesty is excellently able to govern in chief; so he is likewise well seen and skilful in the inferior offices and stages of justice and government; which is a thing very rare in Kings.

Yet nevertheless, somewhat must be said to fulfil an old observance; but yet upon the King's grounds, and very briefly: for, as Solomon saith in another case, *In these things who is he that can come after the King?*

First, You that are the judges of circuits are, as it were, the planets of the kingdom, I do you no dishonour in giving you that name, and no doubt you have a great stroke in the frame of this government, as the other have in the great frame of the world. Do therefore as they do, move always, and be carried with the motion of your first mover, which is your Sovereign. A popular judge is a deformed thing: and *plaudites* are fitter for players than for magistrates. Do good to the people, love them and give them justice; but let it be, as the Psalm saith, *nihil inde expectantes;* looking for nothing, neither praise nor profit.

Yet my meaning is not, when I wish you to take heed of popularity, that you should be imperious and strange to the gentlemen of the country. You are above them in power, but your rank is not much unequal; and learn this, that power is ever of greatest strength, when it is civilly carried.

Secondly, You must remember, that besides your ordinary administration of justice, you do carry the two glasses or mirrors of the state; for it is your duty in these your visitations, to represent to the people the graces and care of the King: and again, upon your return, to present to the King the distastes and griefs of the people.

Mark what the King says in his book: "Procure "reverence to the King and the law; inform my "people truly of me, (which, we know, is hard to do according to the excellency of his merit; but yet endeavour it,) "how zealous I am for religion; how I "desire law may be maintained and flourish; that "every court should have its jurisdiction; that every "subject should submit himself to the law." And of this you have had of late no small occasion of notice and remembrance, by the great and strait charge that the King hath given me as keeper of his seal, for the governing of the chancery without tumour or excess.

Again, *e re nata*, you at this present ought to make the people know and consider the King's blessed care and providence in governing this realm in his absence; so that sitting at the helm of another kingdom, not without great affairs and business; yet he governs all things here by his letters and directions, as punctually and perfectly as if he were present.

I assure you, my lords of the council and I do much admire the extension and latitude of his care in all things.

In the high commission he did conceive a sinew of government was a little shrunk; he recommended the care of it.

He hath called for the accounts of the last circuit from the judges to be transmitted unto him in Scotland.

Touching the infestation of pirates, he hath been careful, and is, and hath put things in a way.

All things that concern the reformation or the plantation of Ireland, he hath given in them punctual and resolute directions. All this in absence.

I give but a few instances of a public nature; the secrets of council I may not enter into, though his dispatches into France, Spain, and the Low-Countries, now in his absence, are also notorious as to the outward sending. So that I must conclude that his Majesty wants but more kingdoms, for I see he could suffice to all.

As for the other glass I told you of, of representing to the King the griefs of his people, without doubt it is properly your part; for the King ought to be informed of any thing amiss in the state of his countries from the observations and relations of the judges, that indeed know the pulse of the country, rather than from discourse. But for this glass, thanks be to God, I do hear from you all, that there was never greater peace, obedience, and contentment in the country; though the best governments be always like the fairest crystals, wherein every little icicle or grain is seen, which in a fouler stone is never perceived.

Now to some particulars, and not many: of all other things I must begin as the King begins; that is, with the cause of religion, and especially the hollow church-papist. St. Augustin hath a good comparison of such men, affirming, that they are like the roots of nettles, which themselves sting not, but yet they bear all the stinging leaves: let me know of such roots, and I will root them out of the country.

Next, for the matter of religion; in the principal place I recommend both to you and to the justices, the countenancing of godly and zealous preachers. I mean not sectaries or novellists, but those which are sound and conform, and yet pious and reverend: for there will be a perpetual defection, except you keep men in by preaching, as well as law doth by punishing; and commonly spiritual diseases are not cured but by spiritual remedies.

Next, let me commend unto you the repressing, as much as may be, of faction in the countries, of which ensue infinite inconveniencies, and perturbations of all good order, and crossing of all good service in court or country, or wheresoever. Cicero, when he was consul, had devised a fine remedy, a mild one, but an effectual and apt one, for he saith, *Eos, qui otium perturbant, reddam otiosos.* Those that trouble others quiet, I will give them quiet; they shall have nothing to do, nor no authority shall be put into their hands. If I may know from you, of any who are in the country that are heads or hands of faction, or men of turbulent spirits; I shall give them *Cicero's* reward, as much as in me is.

To conclude, study the King's book, and study yourselves how you profit by it, and all shall be well. And you the justices of peace in particular, let me say this to you, never King of this realm did you so much honour as the King hath done you in his speech, by being your immediate director, and by sorting you and your service with the service of ambassadors, and of his nearest attendance. Nay more, it seems his Majesty is willing to do the state of justice of peace honour actively also; by bringing in with time the like form or commission into the government of Scotland, as that glorious King, Edward the third, did plant this commission here in this kingdom. And therefore you are not fit to be copies, except you be fair written without blots or blurs, or any thing unworthy your authority: and so I will trouble you no longer for this time.

THE

SPEECH

USED BY

SIR FRANCIS BACON,

LORD KEEPER OF THE GREAT SEAL OF ENGLAND,

TO

SIR WILLIAM JONES,

UPON HIS CALLING TO BE

LORD CHIEF JUSTICE OF IRELAND, 1617.

Sir William Jones,

THE King's most excellent Majesty, being duly informed of your sufficiency every way, hath called you, by his writ now returned, to the state and degree of a serjeant at law; but not to stay there, but, being so qualified, to serve him as his chief justice of his King's bench in his realm of Ireland. And therefore that which I shall say to you, must be applied not to your serjeant's place, which you take but in passage, but to that great place where you are to settle; and because I will not spend time to the delay of the business of causes of the court, I will lead you the short journey by examples, and not the long by precepts.

The place that you shall now serve in, hath been fortunate to be well served in four successions before you: do but take unto you the constancy and integrity of Sir Robert Gardiner; the gravity, temper, and direction of Sir James Lea; the quickness, industry, and dispatch of Sir Humphry Winch; the care and affection to the commonwealth, and the prudent and politic administration of Sir John Denham, and you shall need no other lessons. They were all Lincoln's-Inn men as you are, you have known them as well in their beginnings, as in their advancement.

But because you are to be there not only chief justice, but a counsellor of estate, I will put you in mind of the great work now in hand, that you may raise your thoughts according unto it. Ireland is the last *ex filiis Europæ*, which hath been reclaimed from desolation, and a desart, in many parts, to population and plantation; and from savage and barbarous customs to humanity and civility. This is the King's work in chief: it is his garland of heroical virtue and felicity, denied to his progenitors, and reserved to his times. The work is not yet conducted to perfection, but is in fair advance: and this I will say confidently, that if God bless this kingdom with peace and justice, no usurer is so sure in seven years space to double his principal with interest, and interest upon interest, as that kingdom is within the same time to double the stock both of wealth and people. So as that kingdom, which once within these twenty years wise men were wont to doubt whether they should wish it to be in a pool, is like now to become almost a garden, and younger sister to Great Britain. And therefore you must set down with yourself to be not only a just governor, and a good chief justice, as if it were in England, but under the King and the deputy you are to be a master-builder, and a master-planter, and reducer of Ireland. To which end, I will trouble you at this time but with three directions.

The first is, that you have special care of the three plantations. That of the north, which is in part acted; that of Wexford, which is now in distribution; and that of Longford and Letrim, which is now in survey. And take this from me, that the bane of a plantation is, when the undertakers or planters make such haste to a little mechanical present profit, as disturbeth the whole frame and nobleness of the work for times to come. Therefore hold them to their covenants, and the strict ordinances of plantation.

The second is, that you be careful of the King's revenue, and by little and little constitute him a good demesne, if it may be, which hitherto is little or none. For the King's case is hard, when every man's land

shall be improved in value with increase manifold and the King shall be tied to his dry rent.

My last direction, though first in weight, is, that you do all good endeavours to proceed resolutely and constantly, and yet with due temperance and equality, in matters of religion; lest Ireland civil become more dangerous to us than Ireland savage. So God give you comfort of your place.

After Sir William Jones's speech:

I had forgotten one thing, which was this. You may take exceeding great comfort, that you shall serve with such a deputy; one that, I think, is a man ordained of God to do great good to that kingdom, And this I think good to say to you, that the true temper of a chief justice towards a deputy is, neither servilely to second him, nor factiously to oppose him.

THE

LORD KEEPER'S SPEECH,

IN THE EXCHEQUER,

TO

SIR JOHN DENHAM,

When he was called to be one of the Barons of the Exchequer, in 1617.

Sir John Denham,

THE King, of his grace and favour, hath made choice of you to be one of the barons of the exchequer, to succeed to one of the gravest and most reverend judges of this kingdom; for so I hold Baron Altham was. The King takes you not upon credit but proof, and great proof of your former service: and that in both those kinds wherein you are now to serve: for as you have shewed yourself a good judge between party and party, so you have shewed yourself a good administer of the revenue, both when you were chief baron, and since as counsellor of estate there in Ireland, where the council, as you know, doth in great part manage and messuage the revenue.

And to both these parts I will apply some admonitions, but not vulgar or discursive, but apt for the times, and in few words, for they are best remembered.

First therefore, above all you ought to maintain the King's prerogative, and to set down with yourself, that the King's prerogative and the law are not two things; but the King's prerogative is law, and the principal part of the law, the first-born or *pars prima* of the law; and therefore in conserving or maintaining that, you conserve and maintain the law. There is not in the body of man one law of the head, and another of the body, but all is one entire law.

The next point that I would now advise you is, that you acquaint yourself diligently with the revenue; and also with the ancient records and precedents of this court. When the famous case of the copper-mines was argued in this court, and judged for the King, it was not upon the fine reasons of wit; as that the King's prerogative drew to it the chief *in quaque specie:* the lion is the chief of beasts, the eagle the chief of birds, the whale the chief of fishes, and so copper the chief of minerals; for these are but dalliances of law and ornaments: but it was the grave records and precedents that grounded the judgment of that cause; and therefore I would have you both guide and arm yourself with them against these vapours and fumes of law, which are extracted out of mens inventions and conceits.

The third advice I will give you hath a large extent; it is, that you do your endeavour in your place so to manage the King's justice and revenue, as the King may have most profit, and the subject least vexation: for when there is much vexation to the subject, and little benefit to the King, then the exchequer is sick: and when there is much benefit to the King, with less trouble and vexation to the subject, then the exchequer is sound. As for example; if there shall be much racking for the King's old debts; and the more fresh and late debts shall be either more negligently called upon, or over-easily discharged, or over-indulgently stalled: or if the number of informations be many, and the King's part or fines for compositions a trifle; or if there be much ado to get the King new land upon concealments, and that which he hath already be not known and surveyed, nor the woods preserved, (I could put you many other cases,) this falls within that which I term the sick estate of the exchequer: and this is that which makes every man ready with their undertakings and their projects to disturb the ancient frame of the exchequer; than the which, I am persuaded, there is not a better, this being the burden of the song: That much goeth out of the subject's purse, and little cometh to the king's purse.

Therefore, give them not that advantage so to say. Sure I am, that besides your own associates, the barons, you serve with two superior great officers, that have honourable and true ends, and desire to serve the King and right the subject.

There resteth, that I deliver you your patent.

HIS LORDSHIP'S SPEECH,

IN THE COMMON-PLEAS,

TO

JUSTICE HUTTON,

When he was called to be one of the Judges of the Common-Pleas.

Mr. Serjeant Hutton,

THE King's most excellent Majesty, being duly informed of your learning, integrity, discretion, experience, means, and reputation in your country, hath thought fit not to leave you these talents to be employed upon yourself only, but to call you to serve himself, and his people, in the place of one of his justices of the court of common-pleas.

This court where you are to serve, is the local centre and heart of the laws of this realm: here the subject hath his assurance by fines and recoveries; here he hath his fixed and invariable remedies by *præcipes* and writs of right; here justice opens not by a by-gate of privilege, but by the great gate of the King's original writs out of the chancery. Here issues process of outlawry; if men will not answer law in this centre of law, they shall be cast out. And therefore it is proper for you, by all means, with your wisdom and fortitude, to maintain the laws of the realm: wherein, nevertheless, I would not have you head-strong, but heart-strong; and to weigh and remember with yourself, that the twelve judges of the realm are as the twelve lions under Solomon's throne: they must shew their stoutness in elevating and bearing up the throne. To represent unto you the lines and portraitures of a good judge:

The first is, that you should draw your learning out of your books, not out of your brain.

2. That you should mix well the freedom of your own opinion with the reverence of the opinion of your fellows.

3. That you should continue the studying of your books, and not to spend on upon the old stock.

4. That you should fear no man's face, and yet not turn stoutness into bravery.

5. That you should be truly impartial, and not so as men may see affection through fine carriage.

6. That you should be a light to jurors to open their eyes, but not a guide to lead them by the noses.

7. That you affect not the opinion of pregnancy and expedition by an impatient and catching hearing of the counsellors at the bar.

8. That your speech be with gravity, as one of the sages of the law; and not talkative, nor with impertinent flying out to shew learning.

9. That your hands, and the hands of your hands, I mean those about you, be clean, and uncorrupt from gifts, from meddling in titles, and from serving of turns, be they of great ones or small ones.

10. That you contain the jurisdiction of the court within the ancient merestones, without removing the mark.

11. Lastly, That you carry such a hand over your ministers and clerks, as that they may rather be in awe of you, than presume upon you.

These and the like points of the duty of a judge, I forbear to enlarge; for the longer I have lived with you, the shorter shall my speech be to you; knowing that you come so furnished and prepared with these good virtues, as whatsoever I shall say cannot be new unto you; and therefore I will say no more unto you at this time, but deliver you your patent.

ORDINANCES

MADE BY THE

LORD CHANCELLOR BACON,

For the better and more regular

Administration of Justice in the Chancery,

To be daily observed, saving the prerogative of the Court.

No decree shall be reversed, altered, or explained, being once under the great seal, but upon bill of review: and no bill of review shall be admitted, except it contain either error in law, appearing in the body of the decree, without farther examination of matters in fact, or some new matter which hath risen in time after the decree, and not any new proof which might have been used when the decree was made: nevertheless upon new proof, that is come to light after the decree made, and could not possibly have been used at the time when the decree passed, a bill of review may be grounded by the special license of the court, and not otherwise. Decrees.

2. In case of miscasting, being a matter demonstrative, a decree may be explained, and reconciled by an order without a bill of review; not understanding, by miscasting, any pretended misrating or misvaluing, but only error in the auditing or numbering.

3. No bill of review shall be admitted, or any other new bill, to change matter decreed, except the decree be first obeyed and performed: as, if it be for land, that the possession be yielded; if it be for money, that the money be paid; if it be for evidences, that the evidences be brought in; and so in other cases which stand upon the strength of the decree alone.

4. But if any act be decreed to be done which extinguisheth the parties right at the common law, as making of assurance or release, acknowledging satis-

faction, cancelling of bonds, or evidences, and the like; those parts of the decree are to be spared until the bill of review be determined; but such sparing is to be warranted by public order made in court.

5. No bill of review shall be put in, except the party that prefers it enter into recognizance with sureties for satisfying of costs and damages for the delay, if it be found against him.

6. No decrees shall be made, upon pretence of equity, against the express provision of an act of parliament: nevertheless if the construction of such act of parliament hath for a time gone one way in general opinion and reputation, and after by a later judgment hath been controlled, then relief may be given upon matter of equity, for cases arising before the said judgment, because the subject was in no default.

7. Imprisonment for breach of a decree is in nature of an execution, and therefore the custody ought to be strait, and the party not to have any liberty to go abroad, but by special licence of the lord Chancellor; but no close imprisonment is to be, but by express order for wilful and extraordinary contempts and disobedience, as hath been used.

8. In case of enormous and obstinate disobedience in breach of a decree, an injunction is to be granted *sub pœna* of a sum; and upon affidavit, or other sufficient proof, of persisting in contempt, fines are to be pronounced by the lord Chancellor in open court, and the same to be estreated down into the hanaper, if cause be, by a special order.

9. In case of a decree made for the possession of land, a writ of execution goes forth; and if that be disobeyed, then process of contempt according to the course of the court against the person, unto a commission of rebellion; and then a serjeant at arms by special warrant: and in case the serjeant at arms cannot find him, or be resisted; or upon the coming in of the party, and his commitment, if he persist in disobedience, an injunction is to be granted for the possession; and in case also that be disobeyed, then a commission to the sheriff to put him into possession.

10. Where the party is committed for the breach of a decree, he is not to be enlarged until the decree be fully performed in all things, which are to be done presently. But if there be other parts of the decree to be performed at days, or times to come, then he may be enlarged by order of the court upon recognizance, with sureties to be put in for the performance thereof *de futuro*, otherwise not.

11. Where causes come to a hearing in court, no decree bindeth any person who was not served with process *ad audiendum judicium*, according to the course of the court, or did appear *gratis* in person in court.

12. No decree bindeth any that cometh in *bona fide*, by conveyance from the defendant before the bill exhibited, and is made no party, neither by bill nor the order: but where he comes in *pendente lite*, and while the suit is in full prosecution, and without any colour of allowance or privity of the court, there regularly the decree bindeth; but if there were any intermission of suit, or the court made acquainted with the conveyance, the court is to give order upon the special matter according to justice.

13. Where causes are dismissed upon full hearing, and the dismission signed by the lord Chancellor, such causes shall not be retained again, nor new bill exhibited, except it be upon new matter, like to the case of the bill of review. Dismissions.

14. In case of all other dismissions, which are not upon hearing of the cause, if any new bill be brought, the dismission is to be pleaded; and after reference and report of the contents of both suits, and consideration taken of the former orders and dismission, the court shall rule the retaining or dismissing of the new bill, according to justice and nature of the case.

15. All suits grounded upon wills nuncupative, leases parol, or upon long leases that tend to the defeating of the King's tenures, or for the establishing of perpetuities, or grounded upon remainders put into the crown, to defeat purchasers; or for brokage or rewards to make marriages; or for bargains at play and

wagers; or for bargains for offices contrary to the statute of 5 and 6 Ed. VI. or for contracts upon usury or simony, are regularly to be dismissed upon motion, if they be the sole effect of the bill; and if there be no special circumstances to move the court to allow their proceedings, and all suits under the value of ten pounds, are regularly to be dismissed. *V. postea* § 58, 60.

16. Dismissions are properly to be prayed, and had, either upon hearing, or upon plea unto the bill, when the cause comes first into court; but dismissions are not to be prayed after the parties have been at charge of examination, except it be upon special cause.

17. If the plaintiff discontinue the prosecution, after all the defendants have answered, above the space of one whole term, the cause is to be dismissed of course without any motion; but after replication put in, no cause is to be dismissed without motion and order of the court.

Election of suits.

18. DOUBLE vexation is not to be admitted; but if the party sue for the same cause at the common law and in chancery, he is to have a day given to make his election where he will proceed, and in default of making such election to be dismissed.

Certiorari.

19. WHERE causes are removed by special *certiorari* upon a bill containing matter of equity, the plaintiff is, upon receipt of his writ, to put in bond to prove his suggestions within fourteen days after the receipt; which if he do not prove, then upon certificate from either of the examiners, presented to the lord Chancellor, the cause shall be dismissed with costs, and a *procedendo* to be granted.

Injunction.

20. No injunction of any nature shall be granted, revived, dissolved, or stayed upon any private petition.

21. No injunction to stay suits at the common law shall be granted upon priority of suit only, or upon surmise of the plaintiff's bill only; but upon matter confessed in the defendant's answer, or matter of record, or writing plainly appearing, or when the de-

fendant is in contempt for not answering, or that the debt desired to be stayed appeareth to be old, and hath slept long, or the creditor or the debtor hath been dead some good time before the suit brought.

22. Where the defendant appears not, but sits an attachment; or when he doth appear, and departs without answer, and is under attachment for not answering; or when he takes oath he cannot answer without sight of evidences in the country; or where after answer he sues at common law by attorney, and absents himself beyond sea; in these cases an injunction is to be granted for the stay of all suits at the common law, until the party answer or appear in person in court, and the court give farther order: but nevertheless upon answer put in, if there be no motion made the same term, or the next general seal after the term, to continue the injunction in regard of the insufficiency of the answer put in, or in regard of matter confessed in the answer, then the injunction to die and dissolve without any special order.

23. In the case aforesaid, where an injunction is to be awarded for stay of suits at the common law, if the like suit be in the chancery, either by *scire facias*, or privilege, or English bill, then the suit is to be stayed by order of the court, as it is in other courts by injunction, for that the court cannot injoin itself.

24. Where an injunction hath been obtained for staying of suits, and no prosecution is had for the space of three terms, the injunction is to fall of itself without farther motion.

25. Where a bill comes in after an arrest at the common law for debt, no injunction shall be granted without bringing the principal money into court, except there appear in the defendant's answer, or by sight of writings, plain matter tending to discharge the debt in equity: but if an injunction be awarded and disobeyed, in that case no money shall be brought in, or deposited, in regard of the contempt.

26. Injunctions for possession are not to be granted before a decree, but where the possession hath continued by the space of three years, before the bill exhi-

bited, and upon the same title; and not upon any title by lease, or otherwise determined.

27. In case where the defendant sits all the process of contempt, and cannot be found by the serjeant at arms, or resists the serjeant, or makes rescue, a sequestration shall be granted of the land in question; and if the defendant render not himself within the year, then an injunction for the possession.

28. Injunctions against felling of timber, ploughing up of ancient pastures, or for the maintaining of inclosures, or the like, shall be granted according to the circumstances of the case; but not in case where the defendant upon his answer claimeth an estate of inheritance, except it be where he claimeth the land in trust, or upon some other special ground.

Sequestrations.

29. No sequestration shall be granted but of lands, leases, or goods in question, and not of any other lands or goods, not contained in the suits.

30. Where a decree is made for rent to be paid out of land, or a sum of money to be levied out of the profits of land, there a sequestration of the same lands, being in the defendant's hands, may be granted.

31. Where the decrees of the provincial council, or of the court of requests, or the Queen's court, are by contumacy or other means interrupted; there the court of chancery, upon a bill preferred for corroborations of the same jurisdictions, decrees, and sentences, shall give remedy.

32. Where any cause comes to a hearing, that hath been formerly decreed in any other of the King's courts at Westminster, such decree shall be first read, and then to proceed to the rest of the evidence on both sides.

Suits after judgment.

33. SUITS after judgment may be admitted according to the ancient custom of the chancery, and the late royal decision of his Majesty, of record, after solemn and great deliberation: but in such suits it is ordered, that bond be put in with good sureties to prove the suggestions of the bill.

34. Decrees upon suits brought after judgment shall contain no words to make void or weaken the judgment, but shall only correct the corrupt conscience of the party, and rule him to make restitution, or perform other acts, according to the equity of the cause.

Orders, and the office of the Registers.

35. THE registers are to be sworn, as hath been lately ordered.

36. If any order shall be made, and the court not informed of the last material order formerly made, no benefit shall be taken by such order, as granted by abuse and surreption; and to that end the registers ought duly to mention the former order in the later.

37. No order shall be explained upon any private petition but in court as they are made, and the register is to set down the orders as they were pronounced by the court, truly, at his peril, without troubling the lord Chancellor, by any private attending of him, to explain his meaning; and if any explanation be desired, it is to be done by public motion, where the other party may be heard.

38. No draught of any order shall be delivered by the register to either party, without keeping a copy by him, to the end that if the order be not entered, nevertheless the court may be informed what was formerly done, and not put to new trouble and hearing; and to the end also that knowledge of orders be not kept back too long from either party, but may presently appear at the office.

39. Where a cause hath been debated upon hearing of both parties, and opinion hath been delivered by the court, and nevertheless the cause referred to treaty, the registers are not to omit the opinion of the court, in drawing of the order of reference, except the court doth specially declare that it be entered without any opinion either way; in which case nevertheless the registers are out of their short note to draw up some more full remembrance of that that passed in court, to inform the court if the cause come back and cannot be agreed.

40. The registers, upon sending of their draught

unto the counsel of the parties, are not to respect the interlineations, or alterations of the said counsel, be the said counsel never so great, farther, than to put them in remembrance of that which was truly delivered in court, and so to conceive the order, upon their oath and duty, without any farther respect.

41. The registers are to be careful in the penning and drawing up of decrees, and special matters of difficulty and weight; and therefore when they present the same to the lord Chancellor, they ought to give him understanding which are such decrees of weight, that they may be read and reviewed before his lordship sign them.

42. The decrees granted at the rolls are to be presented to his lordship, with the orders whereupon they are drawn, within two or three days after every term.

43. Injunctions for possession, or for stay of suits after verdict, are to be presented to his lordship, together with the orders whereupon they go forth, that his lordship may take consideration of the order before he sign them.

44. Where any order upon the special nature of the case shall be made against any of these general rules, there the register shall plainly and expressly set down the particulars, reasons and grounds, moving the court to vary from the general use.

References. 45. No reference upon a demurrer, or question touching the jurisdiction of the court, shall be made to the masters of the chancery; but such demurrers shall be heard and ruled in court, or by the lord Chancellor himself.

46. No order shall be made for the confirming or ratifying of any report without day first given, by the space of a sevennight at the least, to speak to it in court.

47. No reference shall be made to any masters of the court, or any other commissioners to hear and determine, where the cause is gone so far as to examination of witnesses, except it be in special causes of parties near in blood, or of extreme poverty, or by consent

and general reference of the estate of the cause, except it be by consent of the parties to be sparingly granted.

48. No report shall be respected in court, which exceedeth the warrant of the order of reference.

49. The masters of the court are required not to certify the state of any cause, as if they would make breviate of the evidence on both sides, which doth little ease the court, but with some opinion; or otherwise, in case they think it too doubtful to give opinion, and therefore make such special certificate, the cause is to go on to a judicial hearing, without respect had to the same.

50. Matters of account, unless it be in very weighty causes, are not fit for the court, but to be prepared by reference, with this difference nevertheless, that the cause comes first to a hearing; and upon the entrance into a hearing, they may receive some direction, and be turned over to have the accounts considered, except both parties, before a hearing, do consent to a reference of the examination of the accounts, to make it more ready for a hearing.

51. The like course to be taken for the examination of court rolls, upon customs and copies, which shall not be referred to any one master, but to two masters at the least.

52. No reference to be made of the insufficiency of an answer, without shewing of some particular point of the defect, and not upon surmise of the insufficiency in general.

53. Where a trust is confessed by the defendant's answer, there needeth no farther hearing of the cause, but a reference presently to be made upon the account, and so to go on to a hearing of the accounts.

Suits in court.

54. In all suits where it shall appear, upon the hearing of the cause, that the plaintiff had not *probabilem causam litigandi*, he shall pay unto the defendant his utmost costs, to be assessed by the court.

Bills, demurrers, answers, pleas.

55. If any bill, answers, replication, or rejoinder, shall be found of an immoderate length, both the party and the counsel under whose hand it passeth shall be fined.

56. If there be contained in any bill, answer, or other pleadings, or any interrogatory, any matter libellous or slanderous against any that is not party to the suit, or against such as are parties to the suit, upon matters impertinent, or in derogation of the settled authorities of any of his Majesty's courts; such bills, answers, pleadings, or interrogatories shall be taken off the file and suppressed, and the parties severally punished by commitment or ignominy, as shall be thought fit, for the abuse of the court; and the counsellors at law, who have set their hands, shall likewise receive reproof or punishment, if cause be.

57. Demurrers and pleas which tend to discharge the suit shall be heard first upon every day of orders, that the subject may know whether he shall need farther attendance or no.

58. A demurrer is properly upon matter defective, contained in the bill itself, and no foreign matter; but a plea is of foreign matter to discharge or stay the suit, as that the cause hath been formerly dismissed, or that the plaintiff is outlawed, or excommunicated; or there is another bill depending for the same cause, or the like: and such plea may be put in without oath, in case where the matter of the plea appear upon record; but if it be any thing that doth not appear upon record, the plea must be upon oath.

59. No plea of outlawry shall be allowed without pleading the record *sub pede sigilli;* nor plea of excommunication, without the seal of the ordinary.

60. Where any suit appeareth upon the bill to be of the natures which are regularly to be dismissed according to the fifteenth ordinance, such matter is to be set forth by way of demurrer.

61. Where an answer shall be certified insufficient, the defendant is to pay costs: and if a second answer be returned insufficient, in the points before certified insufficient, then double costs, and upon the third treble costs, and upon the fourth quadruple costs, and then to be committed also until he hath made a perfect answer, and to be examined upon interrogatories touching the points defective in his answer; but if any answer be certified sufficient, the plaintiff is to pay costs.

62. No insufficient answer can be taken hold of after replication put in, because it is admitted sufficient by the replication.

63. An answer to a matter charged as the defendant's own fact must be direct, without saying it is to his remembrance, or as he believeth, if it be laid down within seven years before; and if the defendant deny the fact, he must traverse it directly, and not by way of negative pregnant; as if a fact be laid to be done with divers circumstances, the defendant may not traverse it literally as it is laid in the bill, but must traverse the point of substance; so if he be charged with the receipt of one hundred pounds, he must traverse that he hath not received a hundred pounds, or any part thereof; and if he have received part, he must set forth what part.

64. If a hearing be prayed upon bill and answer, the answer must be admitted to be true in all points, and a decree ought not to be made, but upon hearing the answer read in court.

65. Where no counsel appears for the defendant at the hearing, and the process appears to have been served, the answer of such defendant is to be read in court.

66. No new matter is to be contained in any replication, except it be to avoid matter set forth in the defendant's answer.

67. All copies in chancery shall contain fifteen lines in every sheet thereof, written orderly and unwastefully, unto which shall be subscribed the name of the principal clerk of the office where it is written, or his deputy, for whom he will answer, for which only subscription no fee at all shall be taken.

68. ALL commissions for examination of witnesses shall be *super interr. inclusis* only, and no return of depositions into the court shall be received, but such only as shall be either comprised in one roll, subscribed with the name of the commissioners, or else in divers rolls, whereof each one shall be so subscribed. **Commissions, examinations, and depositions.**

69. If both parties join in commission, and upon

warning given the defendant bring his commissioners, but produceth no witnesses, nor ministereth interrogatories, but after seek a new commission, the same shall not be granted: but nevertheless upon some extraordinary excuse of the defendant's default, he may have liberty granted by special order to examine his witnesses in court upon the former interrogatories, giving the plaintiff or his attorney notice, that he may examine also if he will.

70. The defendant is not to be examined upon interrogatories, except it be in very special cases, by express order of the court, to sift out some fraud or practice pregnantly appearing to the court, or otherwise upon offer of the plaintiff to be concluded by the answer of the defendant without any liberty to disprove such answer, or to impeach him after of perjury.

71. Decrees in other courts may be read upon hearing without the warrant of any special order: but no depositions taken in any other court are to be read but by special order; and regularly the court granteth no order for reading of depositions, except it be between the same parties, and upon the same title and cause of suit.

72. No examination is to be had of the credit of any witness but by special order, which is sparingly to be granted.

73. Witnesses shall not be examined *in perpetuam rei memoriam*, except it be upon the ground of a bill first put in, and answer thereunto made, and the defendant or his attorney made acquainted with the names of the witnesses that the plaintiff would have examined, and so publication to be of such witnesses; with this restraint nevertheless, that no benefit shall be taken of the depositions of such witnesses, in case they may be brought *viva voce* upon the trial, but only to be used in case of death before the trial, or age, or impotency, or absence out of the realm at the trial.

Ad informandam conscientiam judicis.

74. No witnesses shall be examined after publication, except it be by consent, or by special order, *ad informandam conscientiam judicis*, and then to be

brought close sealed up to the court to peruse or publish, as the court shall think good.

75. No affidavit shall be taken or admitted by any master of the chancery, tending to the proof or disproof of the title, or matter in question, or touching the merits of the cause; neither shall any such matter be colourably inserted in any affidavit for serving of process. Affidavits.

76. No affidavit shall be taken against affidavit, as far as the masters of the chancery can have knowledge; and if any such be taken, the latter affidavit shall not be used nor read in court.

77. In case of contempts grounded upon force or ill words, upon serving of process, or upon words of scandal of the court, proved by affidavit, the party is forthwith to stand committed; but for other contempts against the orders or decrees of the court an attachment goes forth, first, upon affidavit made, and then the party is to be examined upon interrogatories, and his examination referred; and if upon his examination he confess matter of contempt, he is to be committed; if not, the adverse party may examine witnesses to prove the contempt: and therefore if the contempt appear, the party is to be committed; but if not, or if the party that pursues the contempt do fail in putting in interrogatories, or other prosecution, or fail in the proof of the contempt, then the party charged with the contempt is to be discharged with good costs.

78. They that are in contempt, specially so far as proclamation of rebellion, are not to be heard, neither in that suit, nor any other, except the court of special grace suspend the contempt.

79. Imprisonment upon contempt for matters past may be discharged of grace, after sufficient punishment, or otherwise dispensed with: but if the imprisonment be for not performance of any order of the court in force, they ought not to be discharged except they first obey, but the contempt may be suspended for a time.

80. INJUNCTIONS, sequestration, dismissions, re- Petitions.

tainers upon dismissions, or final orders, are not to be granted upon petitions.

81. No former order made in court is to be altered, crossed, or explained upon any petition; but such orders may be stayed upon petition for a small stay, until the matter may be moved in court.

82. No commission for examination of witnesses shall be discharged; nor no examinations or depositions shall be suppressed upon petition, except it be upon point of course of the court first referred to the clerks, and certificate thereupon.

83. No demurrer shall be over-ruled upon petition.

84. No *scire facias* shall be awarded upon recognizances not enrolled, nor upon recognizances enrolled, unless it be upon examination of the record with the writ; nor no recognizance shall be enrolled after the year, except it be upon special order from the lord Chancellor.

85. No writ of *ne exeat regnum*, prohibition, consultation, statute of Northampton, *certiorari* special, or *procedendo* special, or *certiorari* or *procedendo* general, more than once in the same cause; *habeas corpus*, or *corpus cum causa*, *vi laica removend'*, or restitution thereupon, *de coronatore et viridario eligendo*, in case of a moving *de homine repleg. assiz.* or special patent, *de ballivo amovend'*, *certiorari super præsentationibus fact. coram commissariis sewar'*, or *ad quod dampnum*, shall pass without warrant under the lord Chancellor's hand, and signed by him, save such writs *ad quod dampnum*, as shall be signed by master attorney.

86. Writs of privilege are to be reduced to a better rule, both for the number of persons that shall be privileged, and for the case of the privilege: and as for the number, it shall be set down by schedule: for the case, it is to be understood, that besides persons privileged as attendants upon the court, suitors and witnesses are only to have privilege, *eundo, redeundo, et morando*, for their necessary attendance, and not otherwise; and that such writ of privilege dischargeth only an arrest upon the first process, but yet,

where at such times of necessary attendance the party is taken in execution, it is a contempt to the court, and accordingly to be punished.

87. No *supplicavit* for the good behaviour shall be granted, but upon articles grounded upon the oath of two at the least, or certificate upon any one justice of assize, or two justices of the peace, with affidavit that it is their hands, or by order of the star-chamber, or chancery, or other of the King's courts.

88. No recognizance of the good behaviour, or the peace, taken in the country, and certified into the petty bag, shall be filed in the year without warrant from the lord Chancellor.

89. Writs of *ne exeat regnum* are properly to be granted according to the suggestion of the writ, in respect of attempts prejudicial to the King and state, in which case the lord Chancellor will grant them upon prayer of any the principal secretaries without cause shewing, or upon such information as his lordship shall think of weight: but otherwise also they may be granted, according to the practice of long time used, in case of interlopers in trade, great bankrupts, in whose estate many subjects are interested, or other cases that concern multitudes of the King's subjects, also in case of duels, and divers others.

90. All writs, certificates, and whatsoever other process *ret. coram Rege in Canc.* shall be brought into the chapel of the rolls, within convenient time after the return thereof, and shall be there filed upon their proper files and bundles as they ought to be; except the depositions of witnesses, which may remain with any of the six clerks by the space of one year next after the cause shall be determined by decree, or otherwise be dismissed.

91. All injunctions shall be enrolled, or the transcript filed, to the end that if occasion be, the court may take order to award writs of *scire facias* thereupon, as in ancient time hath been used.

92. All days given by the court to sheriffs to return their writs, or bring in their prisoners upon writs of privilege, or otherwise between party and party,

shall be filed, either in the register's office, or in the petty-bag respectively; and all recognisances taken to the King's use, or unto the court, shall be duly inrolled in convenient time, with the clerks of the inrollment, and calendars made of them, and the calendars every Michaelmas term to be presented to the lord Chancellor.

93. In case of suits upon the commissions for charitable uses, to avoid charge, there shall need no bill, but only exceptions to the decree, and answer forthwith to be made thereunto; and thereupon, and upon sight of the inquisition, and the decree brought unto the lord Chancellor by the clerk of the petty-bag, his lordship, upon perusal thereof, will give order under his hand for an absolute decree to be drawn up.

94. Upon suit for the commission of sewers, the names of those that are desired to be commissioners are to be presented to the lord Chancellor in writing; then his lordship will send the names of some privy counsellor, lieutenant of the shire, or justices of assize, being resident in the parts for which the commission is prayed, to consider of them, that they be not put in for private respects; and upon the return of such opinion, his lordship will give farther order for the commission to pass.

95. No new commission of sewers shall be granted while the first is in force, except it be upon discovery of abuse or fault in the first commissioners, or otherwise upon some great or weighty ground.

96. No commission of bankrupt shall be granted but upon petition first exhibited to the lord Chancellor, together with names presented, of which his lordship will take consideration, and always mingle some learned in the law with the rest; yet so as care be taken that the same parties be not too often used in commissions; and likewise care is to be taken that bond with good surety be entered into, in 200*l.* at least, to prove him a bankrupt.

97. No commission of delegates in any cause of weight shall be awarded, but upon petition preferred to the lord Chancellor, who will name the commis-

sioners himself, to the end they may be persons of convenient quality, having regard to the weight of the cause, and the dignity of the court from whence the appeal is.

98. Any man shall be admitted to defend *in forma pauperis*, upon oath, but for plaintiffs they are ordinarily to be referred to the court of requests, or to the provincial councils, if the case arise in those jurisdictions, or to some gentlemen in the country, except it be in some special cases of commiseration, or potency of the adverse party.

99. Licences to collect for losses by fire or water are not to be granted, but upon good certificate; and not for decays of suretyship or debt, or any other casualties whatsoever; and they are rarely to be renewed; and they are to be directed ever unto the county where the loss did arise, if it were by fire, and the counties that abut upon it, as the case shall require; and if it were by sea, then unto the county where the port is, from whence the ship went, and to some sea-counties adjoining.

100. No exemplification shall be made of letters patents, *inter alia*, with omission of the general words; nor of records made void or cancelled; nor of the decrees of this court not inrolled; nor of depositions by parcel and fractions, omitting the residue of the depositions in court, to which the hand of the examiner is not subscribed; nor of records of the court not being inrolled or filed; nor of records of any other court, before the same be duly certified to this court, and orderly filed here; nor of any records upon the sight and examination of any copy in paper, but upon sight and examination of the original.

101. And because time and experience may discover some of these rules to be inconvenient, and some other to be fit to be added; therefore his lordship intendeth in any such case from time to time to publish any such revocations or additions.

THE

PASSAGES IN PARLIAMENT

AGAINST

FRANCIS, VISCOUNT ST. ALBAN,

LORD CHANCELLOR OF ENGLAND.

Anno Domini 1620, *and* 1621.

ON Monday, the nineteenth day of March, 1620, in the afternoon, the commons had a conference with the lords; which conference was reported the next day by the lord treasurer, [who] delivered the desire of the commons to inform their lordships of the great abuses of the courts of justice: the information whereof was divided into these three parts.

First, The persons accused.

Secondly, Of the matters objected against them.

Thirdly, Their proof.

The persons are the lord Chancellor of England, and the now bishop of Landaff, being then no bishop, but Dr. Field.

The incomparable good parts of the lord Chancellor were highly commended, his place he holds magnified, from whence bounty, justice, and mercy were to be distributed to the subjects, with which he was solely trusted, whither all great causes were drawn, and from whence no appeal lay for any injustice or wrong done, save to the parliament.

That the lord Chancellor is accused of great bribery and corruption, committed by him in this eminent place, whereof two cases were alledged:

The one concerning Christopher Awbrey, and the other concerning Edward Egerton. In the cause depending in the Chancery between this Awbrey and Sir William Bronker, Awbrey feeling some hard measure, was advised to give the lord Chancellor *100l.* the which he delivered to his counsel Sir George

Hastings, and he to the lord Chancellor. This business proceeding slowly notwithstanding, Awbrey did write divers letters, and delivered them to the lord Chancellor, but could never have any answer from his lordship; but at last delivering another letter, his lordship answered, If he importuned him he would lay him by the heels.

The proofs of this accusation are five:

The first, Sir George Hastings related it long since unto Sir Charles Montague.

Secondly, the lord Chancellor, fearing this would be complained of, desired silence of Sir George Hastings.

Thirdly, Sir George Hastings's testimony thereof; which was not voluntary, but urged.

Fourthly, the lord Chancellor desired Sir George Hastings to bring the party Awbrey unto him; and promised redress of the wrong done him.

Fifthly, that the lord Chancellor said unto Sir George Hastings, if he would affirm the giving of this 100*l.* his lordship would and must deny it upon his honour.

The case of Mr. Edward Egerton is this: There being divers suits between Edward Egerton and Sir Rowland Egerton in the chancery, Edward Egerton presented his lordship, a little after he was lord Keeper, with a bason and ewer of 50*l.* and above, and afterwards he delivered unto Sir George Hastings and Sir Richard Young 400*l.* in gold, to be presented unto his lordship. Sir Richard Young presented it, his lordship took it, and poised [it], and said, it was too much; and returned answer, That Mr. Egerton had not only enriched him, but had laid a tye upon his lordship to do him favour in all his just causes.

The proofs are the testimony of Sir George Hastings, and the testimony of Merefil a scrivener, thus far: That he took up 700*l.* for Mr. Egerton, Mr. Egerton then telling him, that a great part of it was to be given to the lord Chancellor; and that Mr. Egerton afterwards told him, that the 400*l.* in gold was given to the lord Chancellor. At this conference was farther declared of a bishop, who was touched in this business, upon the bye, whose function was much honoured,

but his person touched herein: this business depending being ordered against Edward Egerton, he procured a new reference thereof from the King to the lord Chancellor: his lordship demanded the parties to be bound in 6000 marks, to stand to his lordship's award: they having entered into that bond, his lordship awarded the matter against Edward Egerton for Sir Rowland Egerton; and Edward Egerton refusing to stand to the said award, a new bill was exhibited in the chancery; and thereupon his lordship ordered that his bond of 6000 marks should be assigned unto Sir Rowland Egerton, and he to put the same in suit in his lordship's name.

The bishop of Landaff, as a friend to Mr. Edward Egerton, advised with Randolph Damport and Butler, which Butler is now dead, that they would procure a stay of the decree of that award, and procure a new hearing: it was agreed that 6000 marks should be given for this by Edward Egerton, and shared amongst them, and amongst certain noble persons.

A recognisance of 10,000*l.* was required from Mr. Egerton to the bishop for the performance hereof: the bishop his share of this 6000 marks was to have [been] so great, as no court of justice would allow: they produce letters of the bishop naming the sum, and setting down a course how this 6000 marks might be raised, namely, the land in question to be decreed for Mr. Egerton, and out of that the money to be levied; and if this were not effected, then the bishop *in verbo sacerdotis* promised to deliver up this recognisance to be cancelled. The new recognisance is sealed accordingly, and Randolph Damport rides to the court, and moved the lord Admiral for his lordship's letter to the lord Chancellor herein: but his lordship denied to meddle in a cause depending in suit.

Then the said Randolph Damport assayed to get the King's letter, but failed therein also: so that the good they intended to Mr. Egerton was not effected; and yet the bishop, though required, refused to deliver up the said recognisance, until Mr. Egerton threatened to complain therefore unto the King.

He shewed also that the commons do purpose, that

if any more of this kind happen to be complained of before them, they will present the same to your lordships, wherein they shall follow the ancient precedents, which shew that great persons have been accused for the like in parliament.

They humbly desire, that forasmuch as this concerneth a person of so great eminency, it may not depend long before your lordships; that the examination of the proofs may be expedited, and if he be found guilty, then to be punished; if not guilty, the now accusers to be punished.

THIS being reported, the lord Admiral presented to the house a letter written unto their lordships, the tenor whereof followeth:

To the Right Honourable his very good Lords, The Lords Spiritual and Temporal, in the Upper House of Parliament assembled.

"*My very good Lords,*

"I HUMBLY pray your lordships all, to make a "favourable and true construction of my absence. It "is no feigning or fainting, but sickness both of my "heart and of my back, though joined with that com-"fort of mind, that persuadeth me that I am not far "from heaven, whereof I feel the first-fruits.

"And because, whether I live or die, I would be "glad to preserve my honour and fame, so far as I am "worthy; hearing that some complaints of base bri-"bery are coming before your lordships, my requests "unto your lordships are:

"First, That you will maintain me in your good "opinion, without prejudice, until my cause be "heard.

"Secondly, That, in regard I have sequestered my "mind at this time, in great part, from worldly mat-"ters, thinking of my account and answers in a higher "court; your lordships will give me convenient time,

" according to the course of other courts, to advise " with my counsel, and to make my answer; wherein, " nevertheless, my counsel's part will be the least: " for I shall not, by the grace of God, trick up an in- " nocency with cavillations, but plainly and ingenu- " ously, as, your lordships know, my manner is, de- " clare what I know or remember.

" Thirdly, That according to the course of justice " I may be allowed to except to the witnesses brought " against me, and to move questions to your lordships " for their cross examinations, and likewise to pro- " duce my own witnesses for the discovery of the " truth.

" And lastly, That if there be any more petitions of " like nature, that your lordships would be pleased not " to take any prejudice or apprehension of any number " or muster of them, especially against a judge that " makes 2000 orders and decrees in a year, not to " speak of the courses that have been taken for hunt- " ing out complaints against me, but that I may " answer them, according to the rules of justice, se- " verally and respectively.

" These requests, I hope, appear to your lordships " no other than just. And so, thinking myself happy " to have so noble peers, and reverend prelates to " discern of my cause, and desiring no privilege of " greatness for subterfuge of guiltiness, but meaning, " as I said, to deal fairly and plainly with your lord- " ships, and to put myself upon your honours and " favours, I pray God to bless your counsels and " persons. And rest

" *Your lordships humble servant,*

19 March, 1620. " FR. ST. ALBAN, *Canc.*"

UPON which letter answer was sent from the lords unto the said lord Chancellor on the said twentieth of March, namely, That the lords received his lordship's letter, delivered unto them by the lord Admiral: they intend to proceed in his cause now before their lordships, according to the right rule of justice, and they shall be glad if his lordship shall clear his honour

therein: to which end they pray his lordship to provide for his just defence.

And afterwards, on Wednesday, the twenty-first of March, the commons sent a message unto the lords concerning their further complaint against the said lord Chancellor, which consisted of these four points, namely,

The first in chancery being between the lady Wharton plaintiff, and Wood and others defendants, upon cross bills; the lord Chancellor upon hearing wholly dismissed them; but upon entry of the order, the cross bill against the lady Wharton was only dismissed; and afterwards, for a bribe of 300*l.* given by the lady Wharton to the lord Chancellor, his lordship decreed the cause farther; and then hearing that Wood and the other defendants complained thereof to the house of commons, his lordship sent for them, and damned that decree as unduly gotten; and when the lady Wharton began to complain thereof, his lordship sent for her also, and promised her redress, saying, "That decree is not yet entered."

Secondly, in the suit between Hall plaintiff, and Holman defendant; Holman deferring his answer was committed to the Fleet, where he lay twenty weeks, and petitioning to be delivered, was answered by some about the lord Chancellor, The bill shall be decreed against him, *pro confesso*, unless he would enter into a 2000*l.* bond to stand to the lord Chancellor's order; which he refusing, his liberty cost him one way or other one thousand pounds. Holman being freed out of the Fleet, Hall petitioned to the lord Chancellor, and Holman finding his cause to go hard with him on his side, complained to the commons; whereupon the lord Chancellor sent for him, and, to pacify him, told him he should have what order he would himself.

Thirdly, in the cause between Smithwicke and Wiche, the matter in question being for accounts with the merchant, to whom it was referred, certified in the behalf of Smithwicke; yet Smithwicke, to obtain

a decree, was told by Mr. Burrough, one near to the lord Chancellor, that it must cost him 200*l.* which he paid to Mr. Burrough or Mr. Hunt, to the use of the lord Chancellor; and yet the lord Chancellor decreed but one part of the certificate; whereupon he treats again with Mr. Burrough, who demanded another 100*l.* which Smithwicke also paid to the use of the lord Chancellor. Then his lordship referred the accounts again to the same merchant, who certified it again for Smithwicke; yet his lordship decreed the second part of the certificate against Smithwicke, and the first part, which was formerly decreed for him, his lordship made doubtful: Smithwicke petitioned to the lord Chancellor for his money again; and Smithwicke had all his money, save 20*l.* kept back by Hunt for a year.

The lord Chief Justice also delivered three petitions, which his lordship received yesterday from the commons: the first by the lady Wharton, the second by Wood and Parjetor and others, and the third by Smithwicke.

The fourth part of the message consists only of instructions delivered unto the commons by one Churchill a register, concerning divers bribes and abuses in the chancery, which the commons desire may be examined.

THE lords, in the mean time, proceeded to the examination of the complaints, and took divers examinations of witnesses in the house, and appointed a select committee of themselves to take examinations also.

And on Wednesday, the twenty-fourth of April, the Prince his highness signified unto their lordships, that the said lord Chancellor had sent a submission unto their lordships, which was presently read *in hæc verba:*

To the Right Honourable the Lords of the Parliament in the Upper House assembled,

The humble Submission and Supplication of the Lord Chancellor.

" *It may please your lordships,*

" I SHALL humbly crave at your lordships hands a " benign interpretation of that which I shall now " write; for words that come from wasted spirits, and " an oppressed mind, are more safe in being deposited " in a noble construction, than in being circled with " any reserved caution.

" This being moved, and as I hope obtained, in the " nature of a protection for all that I shall say; I shall " now make into the rest of that, wherewith I shall at " this time trouble your lordships, a very strange en- " trance: for in the midst of a state of as great afflic- " tion, as I think a mortal man can endure, honour " being above life, I shall begin with the professing of " gladness in some things.

" The first is, That hereafter the greatness of a " judge, or magistrate, shall be no sanctuary or pro- " tection of guiltiness; which, in few words, is the " beginning of a golden world.

" The next, That after this example, it is like that " judges will fly from any thing that is in the likeness " of corruption, though it were at a great distance, as " from a serpent; which tendeth to the purging of the " courts of justice, and the reducing them to their true " honour and splendor.

" And in these two points, God is my witness, that " though it be my fortune to be the anvil, whereupon " those good effects are beaten and wrought, I take " no small comfort.

" But to pass from the motions of my heart, where- " of God is only judge, to the merits of my cause, " whereof your lordships are judges, under God and " his lieutenant. I do understand there hath been " heretofore expected from me some justification: and

" therefore I have chosen one only justification, out of " the justification of Job. For after the clear submis- " sion and confession which I shall now make unto " your lordships, I hope I may say and justify with " Job in these words, *I have not hid my sins, as did* " *Adam, nor concealed my faults in my bosom.* This " is the only justification which I will use.

" It resteth therefore, that, without fig-leaves, I do " ingenuously confess and acknowledge, that having " understood the particulars of the charge, not formally " from the house, but enough to inform my conscience " and my memory, I find matters sufficient and full, " both to move me to desert my defence, and to move " your lordships to condemn and censure me.

" Neither will I trouble your lordships by singling " those particulars which I think might fall off, *Quid* " *te exempta juvat spinis de pluribus una?* Neither " will I prompt your lordships to observe upon the " proofs, where they come not home, or the scruple " touching the credit of the witnesses. Neither will " I represent to your lordships, how far a defence in " divers things mought extenuate the offence in re- " spect of the time and manner of the gift, or the like " circumstances. But only leave these things to spring " out of your own noble thoughts, and observations of " the evidence, and examinations themselves; and cha- " ritably to wind about the particulars of the charge, " here and there, as God shall put into your minds; " and so submit myself wholly to your piety and grace.

Horat. Ep. lib. ii.

" And now, I have spoken to your lordships as " judges, I shall say a few words to you as peers and " prelates; humbly commending my cause to your " noble minds and magnanimous affections.

" Your lordships are not simply judges, but parlia- " mentary judges; you have a farther extent of arbi- " trary power, than other courts. And if your lord- " ships be not tied by ordinary courses of courts or " precedents in points of strictness and severity, much " more in points of mercy and mitigation.

" And yet if any thing which I shall move, mought " be contrary to your worthy ends to introduce a re-

" formation, I should not seek it: but herein I beseech
" your lordships to give me leave to tell you a story.
" Titus Manlius took his son's life for giving battle
" against the prohibition of his general: not many
" years after the like severity was pursued by Papirius
" Cursor, the dictator, against Quintus Maximus; who
" being upon the point to be sentenced, by the inter-
" cession of some principal persons of the senate was
" spared: whereupon Livy maketh this grave and
" gracious observation; *Neque minus firmata est*
" *disciplina militaris periculo Quinti Maximi, quam*
" *miserabili supplicio Titi Manlii.* The discipline of
" war was no less established by the questioning of
" Quintus Maximus, than by the punishing of Titus
" Manlius. And the same reason is of the reforma-
" tion of justice; for the questioning of men of emi-
" nent places hath the same terror, though not the
" same rigour with the punishment.

" But my case standeth not there; for my humble
" desire is, that his Majesty would take the seal into
" his hands; which is a great downfal, and may serve,
" I hope, in itself, for an expiation of my faults.

" Therefore, if mercy and mitigation be in your
" power, and do no ways cross your noble ends, why
" should I not hope of your lordships favour and com-
" miseration?

" Your lordships will be pleased to behold your
" chief pattern, the King our sovereign, a King of in-
" comparable clemency, and whose heart is inscruta-
" ble for wisdom and goodness. Your lordships will
" remember that there sat not these hundred years
" before, a Prince in your house, and never such a
" Prince, whose presence deserves to be made memo-
" rable by records and acts mixed of mercy and jus-
" tice. Your lordships are either nobles, and com-
" passion ever beateth in the veins of noble blood, or
" reverend prelates, who are the servants of Him, who
" would not *break the bruised reed, nor quench the*
" *smoaking flax.* You all sit upon one high stage, and
" therefore cannot but be more sensible of the changes
" of the world, and of the fall of any of high place.

"Neither will your lordships forget that there are "*vitia temporis*, as well as *vitia hominis*; and that "the beginning of reformations hath the contrary "power of the pool of Bethesda; for that had strength "to cure him only that was first cast in, and this hath "commonly strength to hurt him only that is first "cast in. And for my part, I wish it may stay there "and go no farther.

"Lastly, I assure myself, your lordships have a "noble feeling of me, as a member of your own body, "and one that in this very session had some taste of "your loving affections; which, I hope, was not a "lightening before the death of them, but rather a "spark of that grace, which now in the conclusion "will more appear.

"And therefore my humble suit to your lordships "is, That my penitent submission may be my sen-"tence, and the loss of the seal my punishment; and "that your lordships will spare any farther sentence, "but recommend me to his Majesty's grace and par-"don for all that is past. God's holy Spirit be among "you.

"*Your lordships humble servant, and suppliant,*

22d April, 1621. "FR. ST. ALBAN, *Canc.*"

THE lords having considered of this submission, and heard the collections of corruptions charged upon the said lord Chancellor, and the proofs thereof read, they sent a copy of the same without the proofs unto him the said lord Chancellor, by Mr. Baron Denham, and Mr. Attorney-General, with this message from their lordships, namely,

THAT the lord Chancellor's confession is not fully set down by his lordship, in the said submission, for three causes.

1. First, his lordship confesseth not any particular bribe or corruption.

2. Nor sheweth how his lordship heard the charge thereof.

3. The confession, such as it is, is afterwards extenuated in the same submission; and therefore the lords have sent him a particular of the charge, and do expect his answer to the same with all convenient expedition.

UNTO which message the lord Chancellor answered, "that he would return the lords an answer with speed."

And on the twenty-fifth of April the lords considered of the lord Chancellor's said answer, sent unto their message yesterday, and sent a second message unto his lordship to this effect, by the said Mr. Baron Denham, and Mr. Attorney-General, namely,

The lords having received a doubtful answer unto the message their lordships sent him yesterday; and therefore they now send to him again to know of his lordship, directly and presently, whether his lordship will make his confession, or stand upon his defence.

Answer returned by the said messengers, namely,

"The lord Chancellor will make no manner of de-
"fence to the charge, but meaneth to acknowledge
"corruption, and to make a particular confession to
"every point, and after that an humble submission; but
"humbly craves liberty, that where the charge is more
"full than he finds the truth of the fact, he may make
"declaration of the truth in such particulars, the charge
"being brief, and containing not all circumstances.

The lords sent the same messengers back again to the lord Chancellor, to let him know, that their lordships have granted him time until Monday next, the thirtieth* of April, by ten in the morning, to send such confession and submission as his lordship intends to make.

On which Monday the lord Chancellor sent the same accordingly, and that follows *in hæc verba*, namely,

* I presume it should be the twenty-ninth.

To the Right honourable the Lords Spiritual and Temporal, in the high court of Parliament assembled.

The humble Confession and submission of me the lord Chancellor.

UPON advised consideration of the charge, descending into my own conscience, and calling my memory to account, so far as I am able, I do plainly and ingenuously confess that I am guilty of corruption, and do renounce all defence, and put myself upon the grace and mercy of your lordships.

The particulars I confess and declare to be as followeth.

To the first article of the charge, namely, "In the "cause between Sir Rowland Egerton and Edward "Egerton, the lord Chancellor received 300*l.* on the "part of Sir Rowland Egerton, before he had decreed "the cause."

I do confess and declare, that upon a reference from his Majesty of all suits and controversies between Sir Rowland Egerton and Edward Egerton, both parties submitted themselves to my award by recognisances reciprocal in ten thousand marks apiece; thereupon, after divers hearings, I made my award with the advice and consent of my lord Hobard: the award was perfected and published to the parties, which was in February. Then some days after, the three hundred pounds, mentioned in the charge, was delivered unto me. Afterwards Mr. Edward Egerton fled off from the award; then in Midsummer term following a suit was begun in chancery by Sir Rowland to have the award confirmed, and upon that suit was the decree made mentioned in the article.

The second article of the charge, namely, "In the "same cause he received from Edward Egerton 400*l.*"

I confess and declare, that soon after my first coming to the seal, being a time when I was presented by many, the 400*l.* mentioned in the said charge was delivered unto me in a purse, and, as I now call to mind, from

Mr. Edward Egerton; but, as far as I can remember, it was expressed by them that brought it to be for favours past, and not in respect of favours to come.

The article of the charge, namely, "In the cause "between Hody and Hody, he received a dozen of "buttons of the value of 50*l.* about a fortnight after "the cause was ended:"

I confess and declare, that as it is laid in the charge, about a fortnight after the cause was ended, it being a suit for a great inheritance, there were gold buttons about the value of 50*l.* as is mentioned in the charge, presented unto me, as I remember, by Sir Thomas Perrot and the party himself.

To the fourth article of the charge, namely, "In a "cause between the lady Wharton and the coheirs of "Sir Francis Willoughby, he received of the lady "Wharton three hundred and ten pounds:"

I confess and declare, that I did receive of the lady Wharton, at two several times, as I remember, in gold, 200*l.* and 100 pieces; and this was certainly *pendente lite:* but yet I have a vehement suspicion that there was some shuffling between Mr. Shute and the register in entering some orders, which afterwards I did distaste.

To the fifth article of the charge, namely, "In Sir "Thomas Monk's cause he received from Sir Thomas "Monk, by the hands of Sir Henry Holmes, 110*l.* but "this was three-quarters of a year after the suit was "ended:"

I confess it to be true, that I received 100 pieces; but it was long after the suit ended, as is contained in the charge.

To the sixth article of the charge, namely, "In the "cause between Sir John Trevor and Ascue, he re-"ceived on the part of Sir John Trevor 100*l.*"

I confess and declare, that I received at new year's tide 100*l.* from Sir John Trevor; and, because it came as a new year's gift, I neglected to inquire whether the cause was ended or depending; but since I find, that though the cause was then dismissed to a trial at law,

yet the equity is reserved, so as it was in that kind *pendente lite.*

To the seventh article of the charge, namely, "In "the cause between Holman and Young, he received of Young 100*l.* after the decree made for him:"

I confess and declare, that, as I remember, a good while after the cause ended, I received 100*l.* either by Mr. Toby Matthew, or from Young himself: but whereas I have understood that there was some money given by Holman to my servant Hatcher, to that certainly I was never made privy.

To the eighth article of the charge, "In the cause "between Fisher and Wrenham, the lord Chancellor, "after the decree passed, received a suit of hangings "worth one hundred and threescore pounds and better, which Fisher gave him by advice of Mr. Shute:"

I confess and declare, that some time after the decree passed, I being at that time upon remove to York-house, I did receive a suit of hangings of the value, I think, mentioned in the charge, by Mr. Shute, as from Sir Edward Fisher, towards the furnishing of my house, as some others, that were no ways suitors, did present me with the like about that time.

To the ninth article of the charge, "In the cause "between Kennedy and Vanlore, he received a rich "cabinet from Kennedy, prized at 800*l.*"

I confess and declare, that such a cabinet was brought to my house, though nothing near half the value; and that I said to him that brought it, that I came to view it, and not to receive it; and gave commandment that it should be carried back; and was offended when I heard it was not: and some year and an half after, as I remember, Sir John Kennedy having all that time refused to take it away, as I am told by my servants, I was petitioned by one Pinkney that it might be delivered to him, for that he stood engaged for the money that Sir John Kennedy paid for it: and thereupon Sir John Kennedy wrote a letter to my servant Sherborne, with his own hand, desiring I would not do him that disgrace, as to return that gift back,

much less to put it into a wrong hand: and so it remains yet ready to be returned to whom your lordships shall appoint.

To the tenth article of the charge, namely, "He "borrowed of Vanlore 1000*l.* upon his own bond at "one time, and the like sum at another time, upon "his lordship's own bill, subscribed by Mr. Hunt his "man:"

I confess and declare, that I borrowed the money in the article set down, and that this is a true debt; and I remember well that I wrote a letter from Kew, about a twelve-month since, to a friend about the King; wherein I desired, that whereas I owed Peter Vanlore 2000*l.* his Majesty would be pleased to grant me so much out of his fine, set upon him in the star-chamber.

To the eleventh article of the charge, namely, "He "received of Richard Scott 200*l.* after his cause was "decreed, but upon a precedent promise; all which "was transacted by Mr. Shute:"

I confess and declare, that some fortnight after, as I remember, that the decree passed, I received 200*l.* as from Mr. Scott, by Mr. Shute: but precedent promise or transaction by Mr. Shute, certain I am, I knew of none.

To the twelfth article of the charge, namely, "He "received in the same cause, on the part of Sir John "Lenthall, 100*l.*"

I confess and declare, that some months after, as I remember, that the decree passed, I received 100*l.* by my servant Sherborne, as from Sir John Lenthall, who was not in the adverse party to Scott, but a third person, relieved by the same decree, in the suit of one Power.

To the thirteenth article of the charge, namely, "He received of Mr. Worth 100*l.* in respect of the "cause between him and Sir Arthur Mainwaring:"

I confess and declare, that this cause being a cause for inheritance of good value, was ended by my arbitrament, and consent of parties, and so a decree passed of course; and some months after the cause was end-

ed, the 100*l.* mentioned in the said article, was delivered to me by my servant Hunt.

To the fourteenth article of the charge, namely, " He received of Sir Ralph Hansbye, having a cause " depending before him, 500*l.*

I confess and declare, that there were two decrees, one as I remember for the inheritance, and the other for the goods and chattels, but all upon one bill; and some good time after the first decree, and before the second, the said 500*l.* was delivered unto me by Mr. Toby Matthew; so as I cannot deny but it was, upon the matter, *pendente lite.*

To the fifteenth article of the charge, namely, " William Compton being to have an extent for a debt of " 1200*l.* the lord Chancellor stayed it, and wrote his " letter, upon which, part of the debt was paid pre- " sently, and part at a future day: the lord Chancellor " hereupon sends to borrow 500*l.* and because Comp- " ton was to pay 400*l.* to one Huxley, his lordship re- " quires Huxley to forbear six months; and there- " upon obtains the money from Compton: the money " being unpaid, suit grows between Huxley and " Compton in chancery, where his lordship decrees " Compton to pay Huxley the debt with damage and " costs, when it was in his own hands:"

I do declare, that in my conscience the stay of the extent was just, being an extremity against a nobleman, by whom Compton could be no loser; the money was plainly borrowed of Compton upon bond with interest, and the message to Huxley was only to intreat him to give Compton a longer day, and in no sort to make me debtor or responsible to Huxley; and therefore, though I was not ready to pay Compton his money, as I would have been glad to have done, save only 100*l.* which is paid, I could not deny justice to Huxley in as ample manner as if nothing had been between Compton and I; but if Compton hath been damnified in my respect, I am to consider it to Compton.

To the sixteenth article of the charge, namely, " In " the cause between Sir William Bronker and Awbrey, " the lord Chancellor received from Awbrey 100*l.*

I do confess and declare, that the money was given and received, but the manner of it I leave to the witnesses.

To the seventeenth article of the charge, namely, " In the lord Montague's cause, he received from the " lord Montague 600 or 700*l.* and more was to be " paid at the ending of the cause:"

I confess and declare there was money given, and, as I remember, to Mr. Bevis Thelwall, to the sum mentioned in the article, after the cause was decreed; but I cannot say it was ended: for there have been many orders since, caused by Sir Francis Inglefield's contempts; and I do remember, that when Thelwall brought the money, he said that my lord would be yet farther thankful if he could once get his quiet; to which speech I gave little regard.

To the eighteenth article of the charge, namely, " In the cause of Mr. Dunch, he received from Mr. " Dunch 200*l.*"

I confess and declare, that it was delivered by Mr. Thelwall to Hatcher my servant for me, as I think, some time after the decree; but I cannot precisely inform myself of the time.

To the nineteenth article of the charge, namely, " In the cause between Reynell and Peacocke, he re- " ceived from Reynell 200*l.* and a diamond ring " worth 500 or 600*l.*"

I confess and declare, that at my first coming to the seal, when I was at Whitehall, my servant Hunt delivered me 200*l.* from Sir George Reynell, my near ally, to be bestowed upon furniture of my house; adding farther, that he had received divers former favours from me; and this was, as I verily think, before any suit begun: the ring was certainly received *pendente lite;* and though it were at new year's tide, it was too great a value for a new year's gift; though, as I take it, nothing near the value mentioned in the article.

To the twentieth article of the charge, namely, " That he took of Peacocke 100*l.* without interest, " security, or time of payment:"

I confess and declare, that I received of Mr. Peacoke 100*l.* at Dorset-house, at my first coming to the seal, as a present; at which time no suit was begun; and at the summer after, I sent my then servant Lister to Mr. Rolfe, my good friend and neighbour at St. Albans, to use his means with Mr. Peacocke, who was accounted a moneyed man, for the borrowing of 500*l.* and after by my servant Hatcher for borrowing of 500*l.* more, which Mr. Rolfe procured; and told me at both times, it should be without interest, script or note, and that I should take my own time for payment of it.

To the twenty first article of the charge, namely, "In the cause between Smithwicke and Wiche, he "received from Smithwicke 200*l.* which was repaid:"

I confess and declare, that my servant Hunt did, upon his account, being my receiver of the fines upon original writs, charge himself with 200*l.* formerly received of Smithwicke; which, after that I had understood the nature of it, I ordered him to repay, and to defalke it out of his accounts.

To the two and twentieth article of the charge, namely, "In the cause of Sir Henry Ruswell, he re-"ceived money from Ruswell, but it is not certain "how much:"

I confess and declare, that I received money from my servant Hunt, as from Mr. Ruswell, in a purse; and whereas the sum in the article being indefinite, I confess [it] to be 300 or 400*l.* and it was about some months after the cause was decreed: in which decree I was assisted by two of the judges.

To the twenty third article of the charge, namely, "In the cause of Mr. Barker, the lord Chancellor "received from Barker 700*l.*"

I confess and declare, that the sum mentioned in the article was received from Mr. Barker some time after the decree past.

To the twenty fourth, twenty fifth, twenty sixth articles of the charge, namely, The twenty fourth, "There being a reference from his Majesty to his "lordship of a business between the grocers and the

"apothecaries, the lord Chancellor received of the "grocers 200*l.*" The twenty-fifth article, "In the same "cause, he received of the apothecaries, that stood "with the grocers, a taster of gold worth between 400 "and 500*l.* and a present of ambergrease." And the twenty-sixth article, "He received of a new company "of apothecaries, that stood against the grocers, 100*l.*"

To these I confess and declare, that the several sums from the three parties were received; and for that it was no judicial business, but a concord of composition between the parties, and that as I thought all had received good, and they were all three common purses, I thought it the less matter to receive that which they voluntarily presented; for if I had taken it in the nature of a corrupt bribe, I knew it could not be concealed, because it must needs be put to account to the three several companies.

To the twenty-seventh article of the charge, namely, "He took of the French merchants 1000*l.* to constrain "the vintners of London to take from them 1500 tuns "of wine; to accomplish which, he used very indirect "means, by colour of his office and authority, without "bill or suit depending, terrifying the vintners by "threats, and by imprisonments of their persons, to "buy wines whereof they had no need, nor use, at "higher rates than they were vendible:"

I do confess and declare, that Sir Thomas Smith did deal with me in behalf of the French company; informing me, that the vintners by combination would not take off their wines at any reasonable prices; that it would destroy their trade, and stay their voyage for that year; and that it was a fair business, and concerned the state; and he doubted not but I should receive thanks from the King, and honour by it; and that they would gratify me with a thousand pounds for my travail in it: whereupon I treated between them by way of persuasion; and to prevent any compulsory suit, propounding such a price as the vintners might be gainers 6*l.* in a tun, as it was then maintained unto me. And after the merchants petition-

ing to the King, and his Majesty recommending this business unto me, as a business that concerns his customs and the navy, I dealt more earnestly and peremptorily in it; and, as I think, restrained in the messengers hand for a day or two some that were the most stiff; and afterwards the merchants presented me with 1000*l.* out of their common purse, and acknowledging themselves that I had kept them from a kind of ruin, and still maintaining to me, that the vintners, if they were not insatiably minded, had a very competent gain: this is the merits of the cause, as it there appears to me.

To the twenty-eighth article of the charge, namely, "The lord Chancellor hath given way to great exac-"tions by his servants, both in respect of private seals, "and otherwise for sealing of injunctions:"

I confess it was a great fault of neglect in me that I looked no better to my servants.

THIS declaration I have made to your lordships, with a sincere mind, humbly craving that if there should be any mistake, your lordships would impute it to want of memory, and not to any desire of mine to obscure truth, or palliate any thing; for I do now again confess, that in the points charged upon me, though they should be taken, as myself declared them, there is a great deal of corruption and neglect, for which I am heartily sorry, and submit myself to the judgment, grace, and mercy of the court.

For extenuation I will use none concerning the matters themselves; only it may please your lordships, out of your nobleness, to cast your eyes of compassion upon my person and estate. I was never noted for any avaritious man; and the apostle saith, that *covetousness is the root of all evil.* I hope also that your lordships do rather find me in a state of grace, for that in all these particulars there are few or none that are not almost two years old; whereas those that have an habit of corruption do commonly wax worse: so that it hath pleased God to prepare me by precedent degrees

of amendment to my present penitency; and for my estate, it is so mean and poor, as my care is now chiefly to satisfy my debts.

And so fearing I have troubled your lordships too long, I shall conclude with an humble suit unto you, that if your lordships proceed to sentence, your sentence may not be heavy to my ruin, but gracious and mixt with mercy; and not only so, but that you would be noble intercessors for me to his Majesty likewise for his grace and favour.

Your lordships humble servant and suppliant,

FR. ST. ALBAN, *Canc.*

THE lords having heard this confession and submission read, these lords undernamed, namely, the earl of Pembroke, lord Chamberlain; the earl of Arundel, the earl of Southampton, the bishop of Durham, the bishop of Winchester, the bishop of Coventry and Lichfield, the lord Wentworth, the lord Cromwell, the lord Sheffield, the lord North, the lord Chandos, the lord Hunsdon, were sent to him the said lord Chancellor, and shewed him the said confession, and told him, that the lords do conceive it to be an ingenuous and full confession; and demanded of him, whether it be his own hand that is subscribed to the same, and whether he will stand to it or no; unto which the said lord Chancellor answered, namely,

"My lords, it is my act, my hand, my heart: I beseech your lordships to be merciful to a broken reed."

The which answer being reported to the house, it was agreed by the house, to move his Majesty to sequester the seal; and the lords intreated the Prince's Highness, that he would be pleased to move the King: whereunto his Highness condescended; and the same lords, which went to take the acknowledgment of the lord Chancellor's hand, were appointed to attend the Prince to the King, with some other lords added: and his Majesty did not only sequester the seal, but awarded a new commission unto the lord Chief

Justice to execute the place of the Chancellor or lord Keeper.

PARLIAMENT. dat. *primo Maii*, and on Wednesday the second of May the said commission being read, their lordships agreed to proceed to sentence the lord Chancellor to-morrow morning; wherefore the gentleman usher, and serjeant at arms, attendants on the upper house, were commanded to go and summon him the said lord Chancellor to appear in person before their lordships to-morrow morning by nine of the clock; and the said serjeant was commanded to take his mace with him, and to shew it unto his lordship at the said summons: but they found him sick in bed; and being summoned, he answered that he was sick, and protested that he feigned not this for any excuse; for if he had been well he would willingly have come.

The lords resolved to proceed notwithstanding against the said lord Chancellor; and therefore, on Thursday the third day of May, their lordships sent their message unto the commons to this purpose, namely, That the lords are ready to give judgment against the lord viscount St. Alban, lord Chancellor, if they with their Speaker will come to demand it. And the commons being come, the Speaker came to the bar, and making three low obeisances, said:

THE knights, citizens, and burgesses, of the commons house of parliament, have made complaints unto your lordships of many exorbitant offences of bribery and corruption committed by the lord Chancellor; we understand that your lordships are ready to give judgment upon him for the same; wherefore I their Speaker, in their name, do humbly demand, and pray judgment against him the lord Chancellor, as the nature of his offence and demerits do require.

The Lord Chief Justice answered,

MR. SPEAKER,

Upon complaint of the commons against the viscount St. Alban, lord Chancellor, this high court hath hereby, and by his own confession, found him guilty of

: crimes and corruptions complained of by the com-
ons, and of sundry other crimes and corruptions of
: like nature.

And therefore this high court, having first sum-
oned him to attend, and having his excuse of not
ending by reason of infirmity and sickness, which,
protested, was not feigned, or else he would most
llingly have attended; doth nevertheless think fit to
oceed to judgment: and therefore this high court
th adjudge,

I. That the lord viscount St. Alban, lord Chancellor of England, shall undergo fine and ransom of forty thousand pounds.

II. That he shall be imprisoned in the Tower during the King's pleasure.

III. That he shall for ever be uncapable of any office, place, or employment, in the state or commonwealth.

IV. That he shall never sit in parliament, nor come within the verge of the court.

This is the judgment and resolution of this high court.

THE END OF VOL. IV.

C. Baldwin, Printer,
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